

# ACCESS CONTROL AND INNOVATION UNDER THE EMERGING EU ELECTRONIC COMMERCE FRAMEWORK

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## ABSTRACT

Recent legislative developments in the European Union and United States alike have sought to extend legal protection to access control technology. While the United States has chosen to legislate within the Copyright Act, the European Union, as part of its Electronic Commerce framework, has in part chosen to extend legal protection to access control mechanisms by a Directive having no connection with copyright law. This Article focuses on the Conditional Access Directive which extends legal protection to access control technology used in conjunction with certain services and argues that its legal recognition of interests in access control technology can affect the applicability of copyright law as a whole, or more importantly, it can affect the limitations and exceptions found under copyright law which are designed to promote creation and innovation. This Article argues that, given copyright law's promotion of innovation-driven competition, its applicability must be ensured. The Article reveals that the international community and the European Union have previously dealt with similar threats to the integrity of copyright law in several treaty instruments and EU Directives. To avoid placing the applicability of copyright law into question, particularly as applied in the digital environment, this Article recommends that the legal relationship between the Conditional Access Directive and copyright law be more clearly set forth.

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## I. INTRODUCTION

Creation and protection of information products are often considered part of the same equation.<sup>1</sup> As the following recital from the European Union (“EU”) Common Position on the Copyright Directive indicates, ensur-

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1. The term “information product” as used herein is used broadly to refer to any material capable of being digitized and distributed as part of a service over computer networks such as the Internet or any material incorporated in a physical carrier and distributed together with that carrier. The term is not intended to be a legal term of art and will include any copyrighted work as well as information and material not meeting the requisite originality thresholds applicable to copyright protection.

ing an effective level of protection is deemed to provide the necessary incentive to create:

[a]ny harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large.<sup>2</sup>

While the existence of a relationship between creation and protection as presented in the above recital is certainly defensible—although the extent to which the law needs to provide incentive remains a topic of heated dispute—the ability to create, including the ability to innovate, is also a function of access to already created information products and the level of protection granted to those information products.<sup>3</sup> Unless a strictly purist romantic view is embraced, the ability to create and innovate stands in direct relation to the ability to access already created information products as well as the ability to reuse portions of those products.<sup>4</sup> Put simply, there

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2. Common Position to Council Directive 2000/. . ./EC of 14 September 2000 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, recital 9, *available at* <http://europa.eu.int/search/s97.vts> (Nov. 13, 2000) [hereinafter Copyright Directive Common Position]. The term “related rights” as used in EU Directives includes the rights of performers, producers of phonograms and broadcasting organizations. “Related rights” are sometimes referred to as “neighboring rights.” A precise definition of “neighboring rights,” however, does not seem to exist. STEPHEN M. STEWART, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS* § 7.10, at 190 (2d ed. 1989), states that the term “in the narrow sense covers only the rights of performers, producers of phonograms and broadcasting organizations.” In a wider sense it also covers other rights similar to copyright, referred to as “related rights.” J.A.L. STERLING, *WORLD COPYRIGHT LAW: PROTECTION OF AUTHORS’ WORKS, PERFORMANCES, PHONOGRAMS, FILMS, VIDEO, BROADCAST AND PUBLISHED EDITIONS IN NATIONAL, INTERNATIONAL AND REGIONAL LAW* 779, 785 (1998), points to three different ways these rights are referred to in different legal systems: “neighboring rights,” “related rights,” and “connected rights.” Whatever the nature of the “neighboring” or “related” rights scheme in issue, the salient point is that a clearly defined legal relationship with copyright law is set forth. *See infra* Part VI.

3. The Oxford English Dictionary defines “innovation” as “the alteration of what is established by the introduction of new elements or forms.” *OXFORD ENGLISH DICTIONARY* 998 (2d ed. 1989).

4. Access can be viewed from a consumer perspective where generally it is a function of price and the degree of dissemination or availability of an information product. In contrast, access from a creator or innovator perspective is based on the ability to use and reuse material and becomes a function of contractual restrictions on use and technical protection measures that restrict certain uses. “Reuse,” for purposes of this Article, refers to the ability to use legally elements including unprotectable elements such as facts as

is an inverse relationship between the ability to create and the ability to access these products. The situation is similar with regard to legal protection: as more aspects of an information product receive protection and/or receive stronger, more effective protection, it becomes increasingly difficult to reuse existing material to create new information products.<sup>5</sup>

While the ability to control access remains less of an issue in the world of physical artifacts, the digital environment presents unprecedented possibilities for controlling access. Rights holders in information products already have technological means of controlling access (e.g., password protection and encryption), and new technologies continue to become available.<sup>6</sup> Such measures increasingly allow these rights holders to blend access control with control over uses made of their information products.<sup>7</sup> Where access control need not be limited to the *initial* act of access but may extend to access for purposes of copying, printing, extracting, as well as other uses, it is plain that an information rights holder is able to exercise fine-grained control over the uses made of his work. As a result, access control becomes an issue independent of the protection afforded an information product, for instance, by intellectual property laws, and takes on an

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well as protectable expression. Under the “purist romantic view” of authorship, creation simply happens. The author does not rely in any way on already existing works of authorship. In contrast, under the concept of incrementalism, authors rely on already existing works as building blocks for their own works.

5. For recognition of this relationship, see William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 327 (1989) (stating that the cost of expression to authors of copyrighted works increases as copyright protection increases).

6. Technical protection technologies are currently deployed to varying degrees. Some, such as encryption and password protection, are widely deployed. Others, such as web-monitoring, watermarking, time stamping, and rights management languages, are well developed but not yet widely deployed. Copy prevention techniques, including the so-called trusted systems, are deployed to a limited degree. COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS AND THE EMERGING INFORMATION INFRASTRUCTURE & COMPUTER SCIENCE AND TELECOMMUNICATIONS BOARD COMMISSION ON PHYSICAL SCIENCES, MATHEMATICS, AND APPLICATIONS NATIONAL RESEARCH COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* 218 (2000) [hereinafter *DIGITAL DILEMMA*]. For a detailed overview of the issues raised by technical measures, see *id.* at 152-98, and for an overview of current technology, see *id.* at app. E.

7. For instance, access control technology can be combined with further technical measures which enable or disable certain uses, even after a work has been lawfully acquired. As is prevalent on the Internet today, such technology can be combined with standard form contracts in the form of click-on licenses, and may soon be able to “enforce” the conditions set forth in such licenses on the spot. For examples of restrictive online contracts, see, *Case Study—Online Contracts and Technological Protections*, at <http://eon.law.harvard.edu/property99/alternative> (last visited Nov. 19, 2000).

independent relevance for the creation and innovation of information products.<sup>8</sup>

Not only does access technology itself pose challenges for creation and innovation, the effects of which will only become measurable after some time, the environment for creators and innovators has become significantly more complex through the recent extension of legal protection to access control technology. As part of the EU Electronic Commerce framework, the Conditional Access Directive extends legal protection to access control mechanisms used in conjunction with certain services.<sup>9</sup> As examined in this Article, the legal recognition of interests in access control technology can affect the applicability of copyright law as a whole, or more importantly, it can affect the limitations and exceptions designed to promote creation and innovation. Because the Conditional Access Directive extends legal protection to technology controlling access to “Information Society services,” thereby including within its scope information products traditionally used as inputs in creative and innovative uses and available with little in the way of access control, the EU Electronic Commerce

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8. Although not specifically on point, there is early recognition of the potential implications of access control in the 1995 Copyright Green Paper: “Digitisation . . . makes it potentially easier to control acts of exploitation by means of access control, identification and anti-copying devices. . . . At the same time, such developments may have negative implications for the right to privacy of users and rightholders.” Follow-up to the Green Paper on Copyright and Related Rights in the Information Society, ch. 2, COM(96)586 final at 15 [hereinafter Follow-up to Green Paper]. Under EU law, “Commission Green Papers are documents intended to stimulate debate and launch a process of consultation at European level on a particular topic (such as social policy, the single currency . . . [or intellectual property protection]). These consultations may then lead to the publication of a White Paper, translating the conclusions of the debate into practical proposals . . . [including Directives] for Community action.” SCADPlus, *Glossary: Institutions, Policies and Enlargement of the European Union*, at <http://europa.eu.int/scadplus/leg/en/cig/g4000g.htm> (last visited Nov. 14, 2000). A “Directive” is an instruction by the EU to Member States to legislate on a particular matter, in most cases for the sake of harmonization, within a defined period of time. A Directive is binding upon the Member States to which it is addressed, as to the results to be achieved. See P.S.R.F. MATHIJSSEN, *A GUIDE TO EUROPEAN UNION LAW* 28 (7th ed. 1999).

9. In addition to the Conditional Access Directive—Council Directive 98/84/EC of 20 November 1998 on the Legal Protection of Services Based on, or Consisting of, Conditional Access, 1998 O.J. (L 320) 54 [hereinafter Conditional Access Directive]—the EU Electronic Commerce framework primarily includes two other Directives: Council Directive 2000/31/EC of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 2 [hereinafter E-Commerce Directive]; Council Directive 1999/93/EC of 13 December 1999 on a Community Framework for Electronic Signatures, 2000 O.J. (L 13) 12 [hereinafter E-Signatures Directive]. Once the Copyright Directive, still at Common Position, is adopted, it will form an integral part of the framework. See *supra* note 2.

framework is entering into uncharted territory, the wisdom of which remains to be seen.

Surprisingly, interested parties have demonstrated little concern or reservation over this new legislation.<sup>10</sup> This is likely due to the implicit assumption at the time of the promulgation of the Conditional Access Directive that any legal protection would extend only to technology used in conjunction with controlling initial access, and not to subsequent acts or uses of the acquired information product.<sup>11</sup> An overview of the proposed Copyright Directive supports this interpretation by emphasizing the importance of copyright law, thus further underscoring the role of copyright law in regulating use.<sup>12</sup> Indeed, the Explanatory Memorandum to the initial proposal broadly identifies "intellectual property protection" as a "key issue given the critical role creative content and innovation will play in the further development of the Information Society."<sup>13</sup> The Copyright Directive

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10. In the U.K., the Copyright Directorate of the Patent Office indicates in its Draft Regulatory Impact Assessment on the Conditional Access Directive that despite consulting over three hundred organizations and representatives on the Directive, it enjoyed a low response rate. Draft Regulatory Impact Assessment Point 8.1, at <http://www.patent.gov.uk/dpolicy/pdf/draftreg.pdf>. The Assessment states that "[a] very low response rate was probably indicative of satisfaction with the strong protection already enjoyed in the U.K. and the lack of any burdens in the proposal for legitimate business." *Id.*

11. In the United States, the "clear" distinction between access and use shaped the legislative consideration of the Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998). See Comments of the Library Associations In the Matter of Rulemaking Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies at 3 (No. RM 99-7A) (Feb. 17, 2000), available at <http://lcweb.loc.gov/copyright/1201/comments/162.pdf>.

12. The European Parliament's report on the proposed E-Commerce Directive is illuminating as to what the Community legislative bodies understand to provide the applicable property rights structure supporting the EU E-Commerce framework. Of the several Directives referenced in the report as constituting the e-commerce regulatory framework, the proposed Copyright Directive is the only one that addresses property rights. Opinion of the Committee on Economic and Monetary Affairs and Industrial Policy 45, in European Parliament Report A4-0248/99 on the Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, COM(98)586 [hereinafter EP Report A4-0248/99].

13. Explanatory Memorandum to Proposal for a European Parliament and Council Directive on Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society of 10 December 1997, ¶ 2, COM(97)628 final at 2 [hereinafter CRD-Initial Proposal] ("[c]onsultation following the Green Paper confirmed that the existing Community framework on copyright and related rights, although not explicitly shaped for the features of the Information Society, will be of crucial relevance for this new technological environment. However, it needs adaptation . . ."). The crucial role of intellectual property rights and the need for legislative measures to protect it is made explicit in sev-

Common Position further establishes the prominence of copyright in relation to technological measures. It emphasizes the centrality of copyright by stating that “the ultimate aim of these [technological] measures is to give effect to the principles and guarantees laid down in law.”<sup>14</sup>

With the EU Electronic Commerce framework taking shape, however, the implications of being able to control access require further examination. At the time the challenges of the digital environment came knocking at Europe’s door, copyright and related rights principles were the most developed area of applicable Community competence.<sup>15</sup> Although it was criticized for relying solely on copyright to solve the problems of the information society, the Commission’s copyright-centric approach was perhaps initially justified.<sup>16</sup> This is no longer the case.

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eral policy documents. See Europe’s Way to the Information Society: An Action Plan From the Commission to the European Council, COM(94)347 final; the Bangemann Report on “Europe and the Global Information Society—Recommendations to the European Council,” at <http://www.bookmarks.de/lib/politics/bangemann> (last visited Nov. 17, 2000); Copyright and Related Rights in the Information Society of 19 July 1995, COM(95)382 final [hereinafter Copyright Green Paper], and the follow-up thereto; Follow-up to Green Paper, *supra* note 8. The importance of presenting legislative measures in the area of intellectual property was again highlighted in the Commission’s policy communication, A European Initiative on Electronic Commerce, COM(97)157 final [hereinafter Initiative].

14. Copyright Directive Common Position, *supra* note 2, recital 13; see also Initiative, *supra* note 13, point 53, stating “The Commission will take a legislative initiative to deal with certain aspects of copyright and related rights. It will focus on online communications, reproduction and distribution of protected material. This will be *flanked* by adequate legal protection against the circumvention of anti-copy devices and electronic management systems.” (emphasis added). This flanking legal protection refers to technological measures used in conjunction with protecting copyrights and not access in and of itself. Point 55 separately mentions the need for legal protection for conditional access services. Initiative, *supra* note 13, point 55, at 9.

15. As part of its initial approach to these challenges, the 1995 Copyright Green Paper, in its section on “A Legal Framework for the Information Society,” references the existing and developing *acquis communautaire* within copyright and related rights in stating that a basic legal framework already exists at the Community level. See Copyright Green Paper, *supra* note 13, points 73, 78, at 30. The 1996 Follow-up to the Green Paper recognizes that a “strong trend has emerged towards the recognition of the fact that the existing structures of copyright and related rights constitute a valid basis to ensure the protection of works and other subject matter in the Information Society . . . .” Follow-up to Green Paper, *supra* note 8, ch. 4, at 29.

16. See Legal Advisory Board (LAB), Reply to the Green Paper on Copyright and Related Rights in the Information Society, <http://www.ispo.cec.be/legal/en/ipr/reply/reply.html> (last visited Nov. 14, 2000). The reply criticized the Commission for devising solutions in isolation from other fields of private law. Specifically, the reply states: “the LAB advises the Commission not to rely solely on the instrument of copyright in attempting to resolve the problems of the information society.” *Id.*

The 1996 "Follow-up to the Green Paper" noted that other aspects of the regulatory framework were under consultation to "further clarify the exact shape of the emerging information society framework."<sup>17</sup> Those aspects, particularly the Conditional Access Directive, are now part of this framework. Nonetheless, no part of the current EU Electronic Commerce framework addresses the use of contractual provisions or technological measures to side-step the applicability of copyright law, or the use of access control measures to protect works independently of intellectual property rights. Particularly in the area of innovation, the underlying rights structure matters a great deal and overall innovation stands to be negatively affected if copyright law proves inapplicable.

Discourse on this subject is necessary to determine how the Community aims to subscribe to the general principles established for its E-Commerce framework, and how it will achieve its stated goal of creating a coherent regulatory framework while minimizing legal uncertainty.<sup>18</sup> This

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This position is arguably also echoed in the European Parliament Resolution on the 1995 Copyright Green Paper. *See* Point 9: calling for greater attention to different areas, including protection of citizen's rights, confidentiality and the free circulation of information; Point 10: mentioning risks to the privacy interests of users; Point 11: calling for the need to seek balance between intellectual property and the general interest; Point 12: mentioning the importance of equal access to works and services and the importance of accounting for the public service role of libraries and services of the public interest; Point 14: calling for the relationship between copyright exclusive rights and competition policy, with particular reference to the Magill decision, to be accounted for. European Parliament Resolution 4-0354/15 on the Green Paper on Copyright and Related Rights in the Information Society, 1996 O.J. (C 320) 177.

17. The 1996 Follow-up to the Green Paper references the Green Paper on encrypted services, the Green Paper on commercial communications, and the Green Paper on the protection of minors as being part of the regulatory framework for Information Society services that were then under consultation. Follow-up to Green Paper, *supra* note 8, at 4. Copyright Green Paper, *supra* note 13, point 7, at 8-9, references these same areas. This makes the EU framework liable to the same criticisms discussed in Paul Edward Geller, *From Patchwork to Network: Strategies for International Intellectual Property in Flux*, 31 VAND. J. TRANSNAT'L L. 553 (1998).

18. In its communication, A European Initiative in Electronic Commerce, the EU Commission announced the creation of "an adaptable and appropriate" legal framework for electronic commerce based on four general principles: (1) no regulation for regulation's sake; (2) any regulation must be based on all Single Market freedoms; (3) any regulation must take account of business realities; and (4) any regulation must meet general interest objectives effectively and efficiently. Initiative, *supra* note 13, points 4, 39, at 1, 14. The E-Commerce Directive furthers the Initiative's aim of creating a coherent framework by building upon and completing other measures. Moreover, it seeks to remove legal obstacles to the online provision of services and overall to clarify the regulatory framework for Information Society services. In particular, this means pinpointing and removing sources of legal uncertainty. *See* Commission Proposal for a European Par-



type of examination is important because the EU is one of the world's leading trading blocks and also because it is the region to which a substantial number of countries outside the EU look when molding their laws.<sup>19</sup> And with the Council of Europe currently proposing to use the Conditional Access Directive as a blueprint for a Convention extending to thirty-two Member States, not including the fifteen Member States already part of the EU, the time for discourse is indeed ripe.<sup>20</sup>

Accordingly, Part II of this Article surveys the Conditional Access Directive. Part III challenges the copyright-centric view of the EU Electronic Commerce framework by presenting the Conditional Access Directive as an alternative rights structure to that provided by intellectual property laws.<sup>21</sup> This part also addresses practical considerations such as the viability of the rights structure and a copyright owner's ability to opt out of copyright protection and into this rights structure. Part IV challenges the juridical basis of the Conditional Access Directive and asks whether the core "right" of the alternative rights structure, i.e., the "right to control access," is distinct from copyright and neighboring rights schemes. Part V examines the importance of the application of copyright law, particularly the aspects which promote creation and innovation, and reviews the EU's position on competitiveness, innovation, and access. Part VI examines the international conventions on neighboring rights and the EU *acquis communautaire* to determine how they address the interrelationship with copy-

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liament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, COM(98)586 final at 8 [hereinafter Proposed E-Commerce Directive]; see also E-Commerce Directive, *supra* note 9, recitals 7, at 2 (indicating the need for a clear and uniform legal framework) and recital 60 ("In order to allow the unhampered development of electronic commerce, the legal framework must be clear and simple, predictable and consistent with the rules applicable at international level so that it does not adversely affect the competitiveness of European industry or impede innovation in that sector.").

19. This numbers twenty-six countries outside the EU. See JENS GASTER, DIE EINZELSTAATLICHE UMSETZUNG DER DATENBANK-RICHTLINIE—EIN RECHTSVERGLEICH, DATEN UND DATENBANKEN—RECHTSFRAGEN ZU SCHUTZ UND NUTZUNG 35-36 (Rolf Weber & Reto Hilty eds., 1999).

20. Work is also underway on a draft Council of Europe Convention on Legal Protection of Conditional Access Services which is intended to closely follow the adopted Conditional Access Directive. Further information is available from the Media Division, Directorate General of Human Rights, Council of Europe, at <http://www.humanrights.coe.int/media> (last visited Nov. 19, 2000).

21. An "alternative rights structure," as referred to in this Article, is one that presents an alternative to traditional schemes for the protection of works of authorship such as copyright law. The alternative rights structure is to be contrasted with a "neighboring rights" scheme in that a clearly defined legal relationship between the alternative rights structure and copyright law is lacking. See *supra* note 2.

right law and its limitations and exceptions.<sup>22</sup> Specific recommendations for implementation that follow from the arguments made in this Article are set forth in the conclusion.

To avoid placing the applicability of copyright law into question, particularly as applied in the digital environment, this Article recommends that the legal relationship between the Conditional Access Directive and copyright law be more clearly set forth. Specifically, the analysis declares, in line with international neighboring rights conventions and the EU copyright and related rights *acquis communautaire*, that the Conditional Access Directive should exist “neighboring” to copyright.

## II. THE CONDITIONAL ACCESS DIRECTIVE

### A. Coverage of the Conditional Access Directive

The Conditional Access Directive is broad in its coverage. It protects radio and television broadcasting services, and of particular interest for present purposes, Information Society services.<sup>23</sup> Incorporating the definition set out in the Directive on Regulatory Transparency, “Information Society services” include “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.”<sup>24</sup> Using the definition of “services” set forth in the

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22. Mathijsen defines “*acquis communautaire*” as “everything that was decided and agreed upon since the establishment of the [European] Communities, whatever the form in which this was done, whether legally binding or not. It refers to the body of rules which govern the Communities in whatever field of activity.” See MATHIJSEN, *supra* note 8, at 6 n.9.

The existing “copyright and related rights” *acquis communautaire* refers to five Directives: Council Directive 91/250/EEC of 14 May 1991 on the Legal Protection of Computer Programs, 1991 O.J. (L 122) 42 [hereinafter Computer Program Directive]; Council Directive 92/100/EEC of 19 November 1992 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property, 1992 O.J. (L 346) 61 [hereinafter Rental Rights Directive]; Council Directive 93/83/EEC of 27 September 1993 on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, 1993 O.J. (L 248) 15 [hereinafter Cable and Satellite Directive]; Council Directive 93/98/EEC of 29 October 1993 Harmonising the Term of Protection of Copyright and Certain Related Rights, 1993 O.J. (L 290) 9; and Council Directive 96/9/EC of 11 March 1996 on the Legal Protection of Databases, 1996 O.J. (L 77) 20 [hereinafter Database Directive]. See Copyright Directive Common Position, *supra* note 2, recital 20, at 8.

23. Conditional Access Directive, *supra* note 9, art. 2(a), at 56.

24. Council Directive 98/48/EC of 20 July 1998 Amending Directive 98/34/EC, art. 1.2(a), 1998 O.J. (L 217) 18, 21 [hereinafter Regulatory Transparency Directive] (laying down a procedure for the provision of information in the field of technical standards and regulations).

Treaty of Rome, the Regulatory Transparency Directive underscores the intended breadth of coverage by defining “at a distance,” “by electronic means” and “at the individual request of a recipient of services.”<sup>25</sup> The Conditional Access Directive excludes from the definition of “Information Society services” any service provided in the physical presence of the provider and the recipient, or having material content (including “off-line” services such as the distribution of CD-ROMs and software on floppy-diskette). The definition also excludes any service lacking an interactive element.<sup>26</sup> Any other service falls within the definition of Information Society service and therefore within the Conditional Access Directive.<sup>27</sup> It specifically intends to include services becoming more widespread in the online environment, such as pay-per-view, video-on-demand, electronic

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25. “Service” in this context means any performance against payment, as defined in Article 50 of the European Treaty. See TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Mar. 25, 1957, art. 50 (as amended by subsequent treaties), available at [http://europa.eu.int/eur-lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf) [hereinafter European Treaty].

26. While specifically excluded from being Information Society services because they lack the so-called “interactive” element, services using point to multi-point transmission, including radio and television broadcasting services, are nonetheless protected by the Conditional Access Directive. An “indicative list” of services not covered by the definition of services is set forth in the Regulatory Transparency Directive, *supra* note 24, annex V.

Recital 17 of the E-Commerce Directive, *supra* note 9, at 3, seeks further to clarify the definition of an Information Society service by stating that “those services referred to in the indicative list in annex V of Directive 98/34/EC which do not imply data processing and storage are not covered by this definition [of Information Society services].”

27. The Economic and Social Committee recommended that the Commission draw up positive/negative lists of existing services—thereby indicating included and excluded services, respectively—so as to have a clearer understanding and to avoid any ambiguity. Opinion of the Economic and Social Committee on the Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, 1999 O.J. (C 169) 36, 39.

In its amended proposal for the E-Commerce Directive, the Commission specifically added recital 2c to recital 3 to explain the scope of “Information Society service.” Recital 3 sets forth examples of what is and is not to be considered an “Information Society service.” Proposed E-Commerce Directive, *supra* note 18, recital 3, at 3. Included are online activities taking place via telephony and telefax services consisting of transmitting information via a communication network, providing access to a communication network, or hosting information provided by a recipient of the service. Services which are transmitted point-to-point, such as video-on-demand or the sending of commercial communications by e-mail, are also Information Society services. *Id.* These two recitals have become recitals 17 and 18, respectively, in the E-Commerce Directive, *supra* note 9.

publishing, and music-on-demand.<sup>28</sup> To gain protection under the Conditional Access Directive, any such service must be offered for remuneration, using, for instance, a subscription arrangement or a usage-related tariff.<sup>29</sup> However, this requirement is not likely to be strictly interpreted by a court because of the elaboration provided by the E-Commerce Directive.<sup>30</sup>

## B. Rights Structure Underlying the Conditional Access Directive

Article 4 of the Conditional Access Directive establishes a rights structure which requires Member States to prohibit broadly various commercial activities in relation to illicit devices:<sup>31</sup>

Member States shall prohibit on their territory all of the following activities:

- (a) the manufacture, import, distribution, sale, rental or possession for commercial purposes of illicit devices;
- (b) the installation, maintenance or replacement for commercial purposes of an illicit device;
- (c) the use of commercial communications to promote illicit devices.<sup>32</sup>

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28. Explanatory Memorandum to Communication from the Commission to the European Parliament, the Council, and the Economic and Social Committee: Proposal for a European Parliament and Council Directive on the Legal Protection of Services Based on, or Consisting of, Conditional Access, (Provisional Version July 9, 1997), available at <http://europa.eu.int/ISPO/legal/en/converge/condaccess.html> (last visited Nov. 17, 2000) [hereinafter CAD Explanatory Memorandum-Provisional]. As explored in Part IV.A, *infra*, the content at the core of the service is understood to be protected, *inter alia*, by copyright law.

29. CAD Explanatory Memorandum-Provisional, *supra* note 28.

30. Recital 18 of the E-Commerce Directive states:

Information Society Services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; activities such as the delivery of goods or the provision of services off-line are not covered; Information Society Services are not solely restricted to services giving rise to on-line contracting but also, *in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data.*

....

E-Commerce Directive, *supra* note 9, recital 18, at 3-4 (emphasis added). It remains to be seen whether this interpretation will also be applicable to the Conditional Access Directive.

31. An "illicit device" is defined as "any equipment or software designed or adapted to give access to a protected service in an intelligible form without the authorization of the service provider." Conditional Access Directive, *supra* note 9, art. 2(e), at 56.

The Directive establishes legally enforceable duties not to interfere with the granting of access by specifically prohibiting activities performed via illicit devices. Correlatively, the provider of a protected service enjoys the rights to such noninterference, but only against persons engaged in the specified commercial activities.<sup>33</sup> The Directive's approach plainly aims to address piracy by targeting the commercial activities that enable unauthorized access.<sup>34</sup> The Directive does not prohibit similar private activities, including any acts of circumvention.<sup>35</sup>

It is evident that the Directive does not grant a property right in the "protected service" itself—whether such service consists of radio or television broadcasting services, Information Society services, or the provision of conditional access to any of these services as "a service in its own right."<sup>36</sup> The Commission made this choice early on, intending to target

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32. *Id.* art. 4, at 56.

33. The necessary insight can be gained through the application of the Hohfeldian framework. In the Hohfeldian table of legal relations, a "right" consists of being legally protected against someone else's interference or against someone else's withholding of assistance or remuneration, in regard to a certain action or a certain state of affairs. The person who is required to abstain from interference or to render assistance or remuneration is under a "duty" to behave so. What makes the Hohfeldian framework particularly worthwhile is that it is analytically purificatory and definitional rather than empirical or substantive. See WESLEY NEWCOMB HOHFELD, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, in *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 38 (Walter Wheeler Cook, ed. 1923); see also Matthew H. Kramer, *Rights Without Trimmings*, in *A DEBATE OVER RIGHTS* 1-60, 110-11 (Matthew H. Kramer et al. eds., 1998).

34. See Conditional Access Directive, *supra* note 9, art. 1, at 56.

35. The Directive does not prohibit acts of circumvention or other preparatory acts for merely private noncommercial purposes. In the Commentary to Article 3 (Article 4 of the final Directive), it is stated that the approach is "sanctioning the *commercial* activities that favor the unauthorized reception, and not the unauthorized reception as such." CAD Explanatory Memorandum-Provisional, *supra* note 28. In terms of a basis for the list of prohibited activities, the Commentary states that the list "is mainly based on Principle I of Recommendation R(91)14 of the Council of Europe. This Recommendation makes a clear distinction between possession for commercial and for private purposes: the former is declared as unlawful, while the latter is not." It is left as an option for Member States to decide whether to prohibit the possession of illicit devices for private purposes. *Id.*; see also Recommendation No. R(91) 14 of the Committee of Ministers to Member States on the Legal Protection of Encrypted Television Services, available at <http://www.coe.fr/cm/ta/rec/1991/91r14.htm> (Sept. 27, 1991) [hereinafter Recommendation No. R(91) 14].

36. Conditional Access Directive, *supra* note 9, art. 2(a), at 56 (setting forth definition of protected service). A "protected service" is one of a certain kind of service, as specified in the Directive, which is provided against remuneration and on the basis of conditional access. It is plain that the protection provided by the "protected service" is derived from the use of technology that enables conditional access to take place, and not by the law as such.

piracy, defined as either illicit reception or unauthorized access, but did not consider applicable intellectual property rights as providing a sufficient degree of protection.<sup>37</sup>

Moreover, the Commission saw the conditional access model as a business model to promote.<sup>38</sup> In its Green Paper on Encrypted Services, the Commission recognized that television and radio broadcast services are often offered to the public against remuneration (where such remuneration is ensured by a number of techniques that distinguish between "authorized" and "unauthorized" access).<sup>39</sup> Responses to the Green Paper by interested parties confirmed that this access control model is common not only to a wide range of broadcasting services but also to interactive services, regardless of the means of transmission.<sup>40</sup> The Commission made it plain in its initial proposal for a Directive on Conditional Access that it wanted a similar model to be viable for a broad range of services, and with the agreement of the European Parliament it expanded the proposed Directive to include Information Society services.<sup>41</sup>

Either granting property rights in protected services or establishing duties of noninterference, as selected, would have achieved a similar result. On its face, only the selected approach makes the business model viable

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37. The Green Paper on Encrypted Services contains a discussion of the choice between protecting the encoded service itself, thereby giving it the character of an absolute right, or banning "preparatory activities" relating to the manufacture, importation, distribution and possession—either for commercial purposes or for private use—and the commercial promotion and advertising of decoding devices used for pirating. Green Paper on the Legal Protection for Encrypted Services in the Internal Market, Consultation on the Need for Community Action, COM(96)76, 23-31 [hereinafter Encrypted Services Green Paper], available at <http://europa.eu.int/en/record/green/gp004en.pdf> (last visited Nov. 17, 2000). The difference of approach impacts the extent of the protection, since under the first approach protection is absolute (covers all preparatory activities, be they for commercial or for private purposes) while under the second approach protection does not cover the behavior of individuals. *Id.* The concern of the Initial Green paper was illicit reception and rights available through the Cable and Satellite Directive were interpreted not to be applicable. *Id.* at 25-33 (noting that the Directive does not in any way assist operators in their fight against illicit reception, but recognizing that under certain conditions, rights holders could prohibit the unauthorized retransmission of their works).

38. CAD Explanatory Memorandum-Provisional, *supra* note 28. The memorandum indicates that the framework that is being created is meant to be flexible and includes any conditional access technology that is likely to be used. *Id.*

39. Encrypted Services Green Paper, *supra* note 37, at 22-24.

40. "The common feature is that access to the service at a distance is made conditional upon a prior authorisation that aims at ensuring the remuneration of that service." CAD Explanatory Memorandum-Provisional, *supra* note 28.

41. Conditional Access Directive, *supra* note 9, recital 5, at 54.

without substantially interfering with private interests and other rights structures such as intellectual property rights.<sup>42</sup> Notably, it targets the most serious threat to the viability of conditional access infrastructures—commercial activities that facilitate piracy—thus only indirectly targeting illicit reception. The Conditional Access Directive, therefore, arguably meets the Community requirement of proportionality.<sup>43</sup>

### C. Remedies

Article 5 of the Conditional Access Directive establishes enforcement requirements for the rights of noninterference.<sup>44</sup> Specifically, Article 5(2) obliges Member States to ensure that providers of protected services “whose interests are affected by an infringing activity” have access to appropriate remedies, including damages, injunctions or other preventive measures, and where appropriate, the ability to apply for disposal of illicit devices outside commercial channels.<sup>45</sup> As indicated in the Explanatory Memorandum, the Conditional Access Directive thereby requires the availability of this “usual set” of remedies that apply to the relevant activities in most Member States.<sup>46</sup>

### D. Evaluation

There is little question that the Directive broadly covers services, particularly those of increasing importance in the online environment. In this regard, it is relevant that the definition of “Information Society service” only became finalized with the Regulatory Transparency Directive of July 1998.<sup>47</sup> The E-Commerce Directive of June 2000 reveals, however, that

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42. As this Article seeks to point out, this is not the case, however.

43. Encrypted Services Green Paper, *supra* note 37, ch. 4.1. Under EU Law, the principle of proportionality requires that the means employed must be proportionate to the end to be achieved. It is contained as a formal principle of Community Law in the third paragraph of article 5 of the Treaty on European Union: “Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.” European Treaty, *supra* note 25, art. 5.

44. Conditional Access Directive, *supra* note 9, art. 5, at 57. As stated in note 54 *infra*, the aim of the Conditional Access Directive is not to protect the technology itself, but the remuneration interest of the service provider. As the remuneration interest is based on property rights in the conditional access mechanism itself, these property rights are protected under the Directive.

45. Conditional Access Directive, *supra* note 9, art. 5(2), at 57.

46. CAD Explanatory Memorandum-Provisional, *supra* note 28. This “usual set” is shared with the proposed Copyright Directive, which in Article 8 also requires the availability of provisions for damages, injunctions and the seizure of infringing material. See Copyright Directive Common Position, *supra* note 2, art. 8, at 33.

47. Regulatory Transparency Directive, *supra* note 24, art. 1.2. The Green Paper on Encrypted Services of 6 March 1996 also refers to Information Society services and de-

the scope of the definition continues to be a work in progress.<sup>48</sup> Although the 1996 Green Paper on Encrypted Services included this term, one can argue that given the state of technological development at that time, the subject matter of "Information Society services" extended to the type of service which features primarily passive consumption on behalf of the user public (e.g., radio and television broadcasting services also protected under the Conditional Access Directive).<sup>49</sup> Due to the flexibility inherent in the definition of "Information Society service," the term now includes services potentially incorporating information products traditionally available in libraries or book shops, i.e., information products which feature more active use and reuse on behalf of the general public. However, the legislative record is void of any discussion of the potential implications of such an incorporation.

While the types of remedies the Commission requires are fairly standard, one may question their intended strength. The Explanatory Memorandum refers to the TRIPS Agreement, stating that "useful elements may be found in [its enforcement section], which includes a comprehensive set of measures against piracy."<sup>50</sup> Moreover, in formulating provisions on damages, injunctions, and disposal, the Explanatory Memorandum specifically refers to the TRIPS Articles addressing the drafting of these remedies.<sup>51</sup> It is not clear, however, whether the Commission intends to institute remedies similar in strength to those provided by intellectual property rights. Further, it is questionable whether provisions specifically tailored towards these protections are appropriate for the rights structure established by the Conditional Access Directive.<sup>52</sup> This is an important

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fines them as "services provided electronically at a distance on the individual demand of a service receiver (video-on-demand, supply of games on demand, interactive teleshopping)." Encrypted Services Green Paper, *supra* note 37, at 6-7.

48. See E-Commerce Directive, *supra* note 9. For the definition of "Information Society service," see *supra* Part II.A and Regulatory Transparency Directive, *supra* note 24, art. 1, at 20-23.

49. This view can be supported when it is recalled that the model for the Conditional Access Directive largely originates in Recommendation No. R(91) 14 of the Council of Europe. This Recommendation focuses only on the protection of traditional encrypted television program services. See *supra* note 35.

50. CAD Explanatory Memorandum-Provisional, *supra* note 28, art. 8.

51. *Id.* (referencing TRIPS art. 44 (injunctions), art. 45 (rules about damages), art. 46 (seizure of infringing material)). Reference is also made to the Computer Program Directive, *supra* note 22, art. 7, at 45 specifically its provision allowing competent authorities to seize unauthorized copies of computer software.

52. Having similar remedies as copyright law arguably puts the rights structure under the Conditional Access Directive on par with copyright law and helps to establish it as a competing rights structure. As this Article points out, this should be of concern espe-



question to ask because the type of interest that the Directive can vindicate is still under consideration.<sup>53</sup>

### III. THE CONDITIONAL ACCESS DIRECTIVE AS AN ALTERNATIVE RIGHTS STRUCTURE

Does the Conditional Access Directive only protect conditional access mechanisms? This Part argues that the Directive supports an alternative rights structure that can be used not only to protect access but also to serve as a platform for the licensing and protection of information products. As such, this supported rights structure suggests that copyright law no longer needs to provide the applicable property rights scheme.

#### A. Analysis of the Rights Structure

As demonstrated in Part II.B, the Directive creates certain rights of noninterference, and in doing so recognizes an interest that warrants protection. The Commission states that the subject of legal protection is the remuneration interest served by the access control technology.<sup>54</sup> This interest, in accordance with the Directive's definition of "protected service," arises in two instances.<sup>55</sup> First, it can arise from combining a conditional access mechanism with rights attached to the underlying content (e.g., intellectual property rights) as provided in the protected service. In such an instance, the remuneration interest may derive primarily from these rights. Second, the Directive considers the provision of conditional access "a service in its own right," and thereby underscores that the remuneration interest can also arise by merely possessing the technology underlying the conditional access mechanism.<sup>56</sup>

But to what do the rights of noninterference protecting the remuneration interest extend? The Explanatory Memorandum clearly indicates that the object of protection is not the intellectual property contained in the

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cially when the interrelationship between the Conditional Access Directive and copyright is not clearly set forth. As Part VI reveals, the international community has addressed this concern—maintaining the integrity of copyright law—by declaring a rights structure neighboring to copyright. *Id.* For an alternative interpretation, see INSTITUTE FOR INFO. LAW, PROTECTION OF TECHNOLOGICAL MEASURES 47 n.238 (1998) (finding it questionable whether the European Commission truly restricts the procedural rights to service providers).

53. See *infra* text accompanying notes 91, 92, 93, 94.

54. CAD Explanatory Memorandum-Provisional, *supra* note 28 ("the subject of legal protection is not the technology as such, but the legitimate interest served by the technology (remuneration of a service) . . .").

55. Conditional Access Directive, *supra* note 9, art. 2(a), at 56.

56. *Id.*

service nor the access control technology “as such.”<sup>57</sup> In addition, as previously discussed, the Directive does not directly target the act of circumvention, but does target “illicit devices” which give unauthorized access to protected services, and thereby interfere with the remuneration interest. Accordingly, the rights of noninterference implicitly extend to access control technology used in conjunction with obtaining remuneration. Further, the Directive seeks to protect this technology against the “trespass” gained through the use of “illicit devices.”<sup>58</sup> By way of analogy, if one considers breaking and entering a building roughly analogous to circumvention, then the building itself is equivalent to access control technology and any “illicit device” is equivalent to the tools used to gain entry.<sup>59</sup> The Commission’s explicit intention to enable, “at a distance,” the same type of access control mechanism used in cinemas and theatres, supports this interpretation.<sup>60</sup> Therefore, the Commission appears to indicate that the property rights in a conditional access mechanism are similar to the real property interests underlying a cinema or theatre, and thus provide sufficient legal basis for authorizing access and gaining remuneration.<sup>61</sup>

This interpretation provides a legal basis for the “right to authorize or control access” which is explicitly contained within the definition of “conditional access,” and which is arguably central to the conditional access infrastructure.<sup>62</sup> While the Directive’s definition recognizes that “condi-

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57. CAD Explanatory Memorandum-Provisional, *supra* note 28. Presumably the technology “as such” would be protected by industrial property rights. If this interpretation of “as such” is correct, the Explanatory Memorandum merely states that it is not protecting either intellectual or industrial property.

58. Recommendation No. R(91) 14, which served as a main basis for the Encrypted Services Green Paper, defines “illicit access” as “access by persons outside the audience to which the services are reserved by the organisation responsible for their transmission.” Recommendation No. R(91) 14, *supra* note 35.

59. DIGITAL DILEMMA, *supra* note 6, at 312 (setting forth “breaking and entering” analogy and recognizing that legal protection over technological protection mechanisms extends a property right to content owners).

60. CAD Explanatory Memorandum-Provisional, *supra* note 28, n.12. The initial proposal in describing conditional access services and analogizing them to theatres and cinemas states:

All these services are ‘offered to the public’ in the sense that a given content is made available to any member of the public who is prepared to ‘pay the ticket’ for the service. Access to theatres and cinemas is based on the same principle (the difference is that ‘access control’ at a distance is more difficult and requires different techniques).

*Id.* What exactly is meant by “different techniques” is not specified.

61. *See id.*

62. Conditional Access Directive, *supra* note 9, art. 2(b), at 56 states:

tional access” requires “prior individual authorization,” neither it nor the Explanatory Memorandum to the initial proposal indicates the legal basis for authorizing or controlling access.<sup>63</sup> In line with the interpretation above, however, one can infer that the service provider’s “right to authorize or control access” emanates from the access control technology itself.<sup>64</sup> In sum, although the Conditional Access Directive does not explicitly restrict access to information services, it does recognize the existence of property rights in the access control technology which do restrict such access.<sup>65</sup>

## B. Viability of the Alternative Rights Structure

The Conditional Access Directive may implicitly recognize a rights structure similar in nature to real property interests. However, it may also support a stand-alone rights structure similar to copyright law, that can play a central role in the exploitation of works, particularly in the licensing context. There appears to be no obstacle to using the property rights recognized by the Conditional Access Directive both to set conditions concerning access and to control the use of content once the user has gained access. The Commission’s analogy to cinemas and theatres is again helpful.<sup>66</sup> Many cinema and theatre tickets explicitly specify the type of conduct expected of patrons (for example, patrons may not photograph or record any content observed therein); the patrons’ entrance into the cinema or theatre constitutes acceptance of the specified terms. Similarly, the Conditional Access Directive recognizes property rights that may support the use of contracts regulating both the access and use of information products.<sup>67</sup>

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“conditional access shall mean any technical measure and/or arrangement whereby access to the protected service in an intelligible form is made conditional upon prior individual authorisation.” Under the Hohfeldian framework, the “right to authorize or control access” would be referred to as a “power.” In the Hohfeldian table of legal relations, a “power” is used to describe the legal ability to effect a change in legal positions. It is to be contrasted with a “right.” The presence of a power indicates the existence of a “right.” See HOHFELD, *supra* note 33, at 50-51.

63. Conditional Access Directive, *supra* note 9.

64. Under the Hohfeldian framework, a legal “power” follows the confines of the underlying “right.” See HOHFELD, *supra* note 33.

65. For a comparison, see INSTITUTE FOR INFO. LAW, *supra* note 52, at 66 (“Outside of copyright there is a development of a quasi-property right in respect of information services. The CAD may be interpreted as treating access to information services as a new restricted act.”).

66. See *supra* note 60.

67. Online contracting is facilitated under the proposed E-Commerce and Digital Signatures Directives. See E-Commerce Directive, *supra* note 9, arts. 9-11, at 11-12; E-

Ultimately, the viability of the Conditional Access Directive as a stand-alone rights structure depends on the extent to which one can effectively assure protection for the content itself through a combination of contractual and technological devices. In fact, the level of protection may be more effective than that provided by current copyright laws. After all, the conditional access structure allows the rights holder to present terms which require affirmative assent before granting any access.<sup>68</sup> Other technological protection measures (e.g., encryption) can further micromanage the permissibility of certain uses. Technology thus provides a degree of on-the-spot enforcement of use and can assist in protecting information products to an extent that keeps fundamentally honest people honest.<sup>69</sup>

Before electing the protection scheme recognized under the Conditional Access Directive, one should evaluate the effect of adding supplementary contractual and other technological protections. Clearly, actions for breach of contract are available. Article 5 of the Conditional Access Directive, through its extensive set of remedies, arguably vindicates other "interests" as well. Presumably, these interests include anything deemed to interfere with the service provider's interest in remuneration, as long as it constitutes any of the infringing activities set forth in Article 4 when carried out on the service provider's territory.<sup>70</sup> As such, the rights structure supported by the Conditional Access Directive allows information providers to set their terms of use and provides them with remedies for breach of these terms. In this manner, the Directive may provide considerable protection without other rights, such as intellectual property rights, substantially affecting the ultimate end-user. In any event, a vendor of information products can seriously consider the Directive as a primary basis for the exploitation, in particular, of Information Society services.

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Signatures Directive, *supra* note 9, art. 5, at 15. Licensing usually presumes the existence of intellectual property rights. See JOHN W. SCHLICHER, LICENSING INTELLECTUAL PROPERTY: LEGAL, BUSINESS, AND MARKET DYNAMICS 95 (1996). However, this need not be the case under this rights structure.

68. This is readily observable, for example, with pre-packaged software or information resources to which access is restricted on the Internet. In either case, affirmative assent is required to the vendor's terms before access to the desired content is possible.

69. The essential point is that the majority of people will not try to get around a technological measure that restricts what they can and cannot do with an information product. This approach is arguably sufficient for a wide range of different uses. See DIGITAL DILEMMA, *supra* note 6, at 218.

70. See Conditional Access Directive, *supra* note 9, art. 4, at 57. Exactly which interests may be vindicated through Article 5 of the Conditional Access Directive is still under consideration. See *infra* text accompanying notes 92, 93, 94.

### C. Opting for the Alternative Rights Structure

A copyright holder opting for the alternative rights structure must consider at least three issues: (1) is he eligible?; (2) does the copyright holder have the incentive to opt for the alternative rights structure?; and (3) does the law permit opting out of copyright protection?

#### 1. Eligibility

There seems to be no reason why a copyright holder would be ineligible to opt into the rights structure provided by the Conditional Access Directive. Essentially, the copyright holder need only offer the work in digital format, online, and in exchange for remuneration. In short, he must provide his work as an Information Society service. Any protection would be limited to the remuneration interest, including any technology used to protect it. Protection would not extend to the circumvention of rights management information or to technological measures used by the copyright holder in connection with the exercise of his intellectual property rights.<sup>71</sup> However, to the extent that the rights holder could adapt the technology to fit within the requirements of the Directive, protection would be within reach.<sup>72</sup>

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71. Article 12(2) of the WIPO Copyright Treaty defines "rights management information"

as information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.

WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65, available at <http://www.wipo.org/treaties/ip/wipo-copyright/copyright1-eng.html> (last visited Nov. 17, 2000) [hereinafter Copyright Treaty].

72. CAD Explanatory Memorandum-Provisional, *supra* note 28. However, protection under the Conditional Access Directive would be available where such technological measures also provide for a system of access that complies with the definition of conditional access as set forth in the Directive. For example, to the extent an ECMS also controls access it arguably would be protected under the Directive. An Electronic Management Information System (ECMS) enables the "identification of protected material and recording of use of such material, by means of digital identification signals incorporated in the sound recording, film, etc." See STERLING, *supra* note 2, at 770. For the definition of "conditional access," see *supra* note 62. The Explanatory Memorandum, in stating that "[s]ome indicative, and not exhaustive, examples of Conditional Access techniques [include] . . . electronic locks, that allow the publisher to 'lock' a given content in such a way that access to the service is made conditional upon a prior authorisation (e.g. on a subscription basis)," seems to recognize that conditional access measures could extend to uses made of content so long as they are intertwined with access control. CAD Explanatory

## 2. *Incentive*

The Internet frees markets from geographical boundaries and permits instantaneous globalization. While expanding the size of many markets, the Internet also permits smaller or new markets to overcome high distribution costs and low expected sales, and therefore become viable. The Internet and digital technology can also be used to expand product appeal by offering more versions of the same information product to consumers. In particular, vendors offering digitized materials can more easily turn off certain features and thereby expand their markets to reach previously inaccessible market segments.<sup>73</sup>

To enable a rights holder to take full advantage of the digital environment, an underlying legal framework should support the rights holder's desire to price discriminate between different groups and restrict one group from reselling to another. As not all information products need the same level of protection, this framework should also provide flexibility. While some products have a high and persistent value, others may have only a modest value for a fleeting period of time. Accordingly, an optimal legal framework permits a rights holder to tailor protection to his information product by factoring in parameters such as technology, the type of information product, and expectations as to the extent of protection.

Copyright law, however, through various exceptions and limitations to a rights holder's exclusive rights, can interfere with the copyright holder reaching certain markets. Through the doctrine of exhaustion, for example, it can foreclose secondary markets such as those serviced by used book stores, video rental shops, or libraries from the copyright owner.<sup>74</sup> Other limitations and exceptions may further limit the rights holder's ability to engage in price discrimination. Accordingly, copyright law may limit the ability to fine-tune protection according to the nature of an information product and thus may prevent or limit the rights holder from servicing certain market segments. In contrast, there are no similar exceptions and limitations applicable to the rights structure supported under the Conditional Access Directive.<sup>75</sup> Rather, the alternative rights structure permits a

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tory Memorandum-Provisional, *supra* note 28, art. 1(b), cmts. Neither "technical measure" nor "arrangement" are defined by the Directive.

73. See generally CARL SHAPIRO & HAL. R. VARIAN, *INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY* (1998).

74. See generally Michael J. Meurer, *Practice Discrimination, Personal Use and Privacy: Copyright Protection of Digital Works*, 45 *BUFF. L. REV.* 845 (1997).

75. Certain mandatory rights, limitations, and exceptions found under the Database and Computer Program Directives would still be applicable if any contracting is in-

greater tailoring of protection than copyright law, enabling the rights holder potentially to reach any market segment. The availability of this alternative rights structure may additionally lead a rights holder to engage in a cost-benefit exercise to decide whether or not to opt for protection under copyright law.

Under the EU Electronic Commerce framework, however, the likelihood of rights holders electing to opt into the alternative rights structure may be somewhat tempered by recent legal developments. As set forth in the proposed Copyright Directive, exhaustion is not applicable within the online environment.<sup>76</sup> Any loss of revenue would accordingly not be felt by the application of the exhaustion doctrine. In addition, the proposal has introduced the requirement that rights holders be fairly compensated in most of the instances where the proposal provides an exception to the exclusive rights.<sup>77</sup> Accordingly, instances where the rights holder previously did not receive remuneration are eliminated. Ultimately, however, the extent to which such compensation turns out to be “fair” will certainly influence a rights holder’s decision of whether to stay within the copyright rights scheme. Unless one accounts for the fad effect of some information products, “fair compensation” may offer little appeal.

### 3. *Opting Out of Copyright Protection*

Recent commentary has focused on whether copyright limitations and exceptions can be contracted around or completely overridden through contract law or technological protection devices.<sup>78</sup> The related question of whether a creator is required to receive protection under copyright law has

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involved. *See* Database Directive, *supra* note 22, arts. 6(1), 8, 15, at 25-27; Computer Program Directive, *supra* note 22, arts. 5, 6, 9(1), at 44-46.

76. Amended proposal for a European Parliament and Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society of May 25, 1999, 1999 O.J. (C 180) 6, recital 19, at 8 [hereinafter CRD-Amended Proposal] (“[T]he question of exhaustion does not arise in the case of services and online services in particular.”); *see id.* art 3.3, at 10. Under the US Copyright Act, the equivalent to exhaustion is the first sale doctrine which can be found under Section 109. *See* 17 U.S.C. §109 (1994 & Supp. IV 1998).

77. CRD-Amended Proposal, *supra* note 76, recital 26, at 9. The requirement of “fair compensation” extends to exceptions addressing reproduction on paper, analog and digital private copying, and reproductions made by social institutions. *Id.* art. 5(2), at 12.

78. *See* Jaap H. Spoor, *General Aspects of Exceptions and Limitations to Copyright: General Report*, in ALAI STUDY DAYS: THE BOUNDARIES OF COPYRIGHT: ITS PROPER LIMITATIONS AND EXCEPTIONS 27 (Libby Baulch et al. eds., 1998) (summarizing national reports setting forth various positions on these issues); *see also* LUCIE M.C.R. GUIBAULT, *Contract and Copyright Exemptions*, in COPYRIGHT AND ELECTRONIC COMMERCE 125, 126 (P. Bernt Hugenholtz ed., 2000).

not received the same attention. One can make the argument that if a creator does not avail himself of protection under copyright law, the law including its limitations and exceptions—unless they are individually of mandatory effect—should not be applicable.<sup>79</sup> Ultimately, it is a question of Member State competence and depends on the statutory construction of respective copyright or author's rights laws and in particular, whether these are sets of default rules or mandatory schemes.<sup>80</sup> Under U.K. law, for example, section 171(2) of the 1988 Copyright, Designs and Patents Act is the applicable provision in point.<sup>81</sup> This provision keeps competing rights structures from interfering with copyright protection by indicating that “no copyright or right in the nature of copyright, shall subsist otherwise than by virtue of this Part or of some other enactment in that behalf.”<sup>82</sup> Accordingly, the necessary determination with regard to the Conditional Access Directive would need to focus on whether the rights structure given rise to by the Directive includes a “right in the nature of copyright.”<sup>83</sup>

#### D. Evaluation

This Part challenged the assumption that intellectual property laws, most notably copyright, provide the applicable set of property rights for the emerging EU Electronic Commerce framework. It presented an alter-

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79. See Tom W. Bell, *Fair Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557, 618-19 (1998) (arguing that allowing copyright owners to opt out of copyright law and its fair use doctrine may reveal a system more beneficial to the right holder).

80. Under U.K. law the concept of an overriding English Statute is effectively the same thing as a mandatory rule of the forum. See JAMES FAWCETT & PAUL TORREMANS, *INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW* 578 (1998). A related issue is whether copyright limitations and exceptions are applicable notwithstanding the underlying rights scheme. In other words, a rights holder may be able to opt out of copyright protection, but the effect of this is limited due to certain limitations and exceptions being of mandatory application. For mandatory provisions under EU Directives, see *supra* note 75.

81. See Copyright, Designs and Patents Act, 1988, c. 48, § 171(2) (Eng.); see also Copyright Act, 1956, c. 74, § 46(5) (Eng.) (using the phrase “no copyright or right in the nature of copyright”); Copyright Act, 1911, c.46, § 31 (Eng.) (using the phrase “copyright or any similar right”).

82. Copyright, Designs and Patents Act, 1988, c. 48, § 171(2) (Eng.). No interpretation is yet available of the phrase “right in the nature of copyright” but statutorily permissible actions for breach of trust or confidence stand certain to shape any discussion. See *id.* § 171 (1)(e) which permits actions for breaches of trust or confidence. Such actions were similarly permitted under the 1956 Act (Section 46(4)) and the 1911 Act (Section 31). Copyright Act 1956, c. 74, § 46(4) (Eng.); Copyright Act 1911, c. 46 § 31 (Eng.).

83. Copyright, Designs and Patents Act, 1988, c. 48, § 171(2) (Eng.).



native rights structure, centered on the recognition of interests in access control technology, analogous to real property interests. The Conditional Access Directive makes this alternative rights structure attractive by offering the possibility of vindicating a range of interests through the remedies it provides, which, as recognized in Part II.C., are identical to copyright remedies. Moreover, the Directive fails to define the terms "technical measure" and "arrangement," which are integral to the definition of "conditional access." As such, it would therefore seem to allow a rights holder to seek copyright-style remedies, where access control technology combines control over access and uses, without the protected service necessarily being protected under copyright law.<sup>84</sup>

But the property interests in the access control technology need not provide the foundation in order for an alternative rights structure to copyright to exist. Rather, such technology can be used in combination with contracts regulating access to and use of desired content. In such a case, the contract may provide the centerpiece in a rights structure alternative to copyright law. The Conditional Access Directive, by targeting the significant threat of commercial activities that facilitate piracy, would play an important role in bolstering the viability and effectiveness of the contract and any other applicable interests by lowering the probability of significant infringement. This would be the case even if the Directive were interpreted to extend exclusively to control over access and not to control over uses. In either situation, the Conditional Access Directive can support or help support an alternative rights structure that can be used to protect not only access, but also to serve as a platform for the licensing and protection of information products. Where this is the case, copyright law arguably no longer needs to provide the applicable property rights scheme.

#### **IV. INTERRELATIONSHIP OF THE CONDITIONAL ACCESS DIRECTIVE AND COPYRIGHT LAW**

Given that the Conditional Access Directive may enable an alternative rights structure to copyright law, the relationship between the Directive and copyright law becomes important. In short, if this relationship is not carefully set out, the applicability of copyright law is placed into question. Consequently, as is argued in Part V, this will negatively affect copyright law's promotion of innovation.

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84. *See supra* note 52.

### A. The EU Commission Position

The Commission has sought to clarify the relationship between the Conditional Access Directive and copyright law by illuminating several aspects. First, it has indicated that it considers protection under the Conditional Access Directive complementary to that provided under Article 6 of the proposed Copyright Directive.<sup>85</sup>

Second, it has stated that the two Directives apply to different areas.<sup>86</sup> The Conditional Access Directive addresses protection against unauthorized reception of a conditional access service, which may or may not contain—or be based upon—intellectual property.<sup>87</sup> In contrast, the proposed Copyright Directive deals with the unauthorized exploitation of a protected work or other subject matter, such as unauthorized copying, making available, or broadcasting of copyrighted material.<sup>88</sup>

Third, the Commission has stated that third parties (such as holders of intellectual property rights) may not bring an action directly under the Conditional Access Directive.<sup>89</sup> Rather, the interests of copyright holders remain distinct, even though from an economic point of view those rights holders would certainly benefit from the existence of the remedies available under the Conditional Access Directive.<sup>90</sup> On this third issue, both the European Parliament and the Economic and Social Committee have criticized the Commission for not extending this right to copyright holders. Both bodies have expressed general dissatisfaction with the degree of protection available under the Conditional Access Directive and feel that extending protection to copyright holders is more in line with the Copyright Green Paper of 1995.<sup>91</sup> Consequently, the Parliament has proposed

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85. See CRD-Initial Proposal, *supra* note 13, art. 6(4), cmts., at 42; CRD-Amended Proposal, *supra* note 76, art. 6, at 13.

86. CRD-Initial Proposal, *supra* note 13, art. 6(4), cmts., at 42.

87. *Id.*

88. *Id.*

89. See Conditional Access Directive, *supra* note 9, art. 5, at 57 (limiting the availability of remedies to “providers of protected services”); see also Encrypted Services Green Paper, *supra* note 37, at 23 (referring to Recommendation No. R(91) 14 indicating: “[t]here are no rights of action for the rights owners of programmes included in the services.”); see also Recommendation No. R(91) 14, *supra* note 35.

90. See CAD Explanatory Memorandum-Provisional, *supra* note 28, art. 1(g), cmt. (also stating that the same reasoning applies to the issue of industrial property rights for Conditional Access devices).

91. Explanatory Statement to European Parliament Report A4-0136/98 on the Proposal for a European Parliament and Council Directive on the Legal Protection Services Based On, or Consisting Of, Conditional Access, of Apr. 21, 1998, ch. III.A(7), ch.

extending protection to protect the “economic value” of a service “or its content,” rather than merely ensuring remuneration for it.<sup>92</sup> In this manner, third parties would be able to bring an action to protect their economic interests in the services or content provided. Although the Commission and the Council of Ministers have both rejected this proposal,<sup>93</sup> the issue remains open as the Commission has pledged to assess it within three years of the Directive coming into force.<sup>94</sup>

This criticism on behalf of the Community legislative bodies indicates that the relationship between the two Directives is not as straightforward as the Commission would have it seem. In examining this issue, therefore, it is worthwhile to consider the central point of the alternative rights structure—the “right to control access.”

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IV(17), COM(97)356, at 16 and at 20, respectively (stating that the European Parliament believes the Commission proposal to be inadequate and that the Directive’s provisions must be considerably strengthened) [hereinafter EP Report A4-0136/98]. The Report also states:

... we make this assessment without being influenced by the specific reasons underpinning the Commission’s position: whether these be tactical with the gradual approach to the problem seemingly preferable at this stage (possibly because of reactions from the Member States or circles within the Council), or, more simply for purely technical legislative reasons because the Commission may be planning to regulate certain aspects of the problem by means of further proposals.”).

*Id.* ch. III.A(7), at 16. At the very least, this statement indicates that the European Parliament is uncertain as to the Commission’s direction on these issues. For the Economic and Social Committee’s position, see Opinion of the Economic and Social Committee on the Proposal for a European Parliament and Council Directive on the Legal Protection of Services Based on or Consisting of Conditional Access, 1998 O.J. (C 129) 16.

92. Opinion of the European Parliament of 30 April 1998, 1998 O.J. (C 152) 59, 63 amend. 20. The proposal would recognize the rights set out in Article 4(2) of the initial Directive proposal for owners of intellectual property rights by amending the definition of “conditional access” to mean “any technical measure and/or arrangement whereby access to the service in an intelligible form is made conditional upon a prior individual authorization aiming at *protecting the economic value* of that service *or its content.*” *Id.*

93. European Parliament Recommendation A4-0325/98 for Second Reading on the Common Position Established by the Council With a View to the Adoption of a European Parliament and Council Directive on the Legal Protection of Services Based on, or Consisting of, Conditional Access, 1998 O.J. (C 328) 5 (stating that the Commission and Council considered that the EP amendment to recognize the rights for owners of intellectual property rights went further than the Directive’s objectives).

94. Conditional Access Directive, *supra* note 9, art. 7, at 57 (stating that where appropriate, the Commission will present proposals to amend the definitions under Article 2 “in light of technical and economic developments and of the consultations carried out by the Commission”).

## B. The “Right to Control Access” under Copyright and Neighboring Rights Schemes

One should note that the “right to control access” is not unique. Rather, it simply emanates from the recognition of property rights in an infrastructure used to control access. As everyday experience tells us, such infrastructures, whether cinemas, theatres, or library buildings, are commonplace. If this “right to control access” is indeed so common, one should further question if such a “right to control access” is somehow part of copyright or neighboring rights schemes. An examination of recent amendments to the copyright rights landscape proves illustrative. As part of Article 8 of the WIPO Copyright Treaty, the right of communication to the public now explicitly includes the right of making available to the public.<sup>95</sup> This right, which originates from a proposal of the EU Commission and its Member States to the WIPO Committee of Experts in 1996, soon stands to become part of the *acquis communautaire* as Article 3(1) of the proposed Copyright Directive.<sup>96</sup> The right extends to interactive “on-demand” acts of transmissions; for purposes of the right, it is not relevant whether a person has retrieved the work or not. Of particular importance to our examination, the right is deemed “pertinent when several unrelated persons (members of the public) may have individual access, from different places and at different times, to a work which is on a publicly accessible site.”<sup>97</sup> Accordingly, the right of making available enables a copyright

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95. Copyright Treaty, *supra* note 71, art. 8. Unlike other provisions this provision went through the Diplomatic Conference virtually unscathed.

96. Copyright Directive Common Position, *supra* note 2, art. 3, at 22. Article 3(1), Right of communication to the public, including the right of making available works or other subject matter states:

Member States shall provide authors with the exclusive right to authorize or prohibit any communication to the public of originals and copies of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

*Id.* art. 3(1), at 22. It applies to all works and is geared towards the “making available of the work to the public”: the offering of a work on a publicly accessible site, such offering preceding the stage of the work’s actual “on-demand transmission.” CRD-Initial Proposal, *supra* note 13, art. 3, cmts., at 32; *see also Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to Be Considered by the Diplomatic Conference*, draft art. 10 and notes 10.10, 10.11, 10.13, WIPO Doc. CRNR/DC/4 (Aug. 30, 1996) [hereinafter *WCT Basic Proposal*].

97. CRD-Initial Proposal, *supra* note 13, art. 3, cmts., at 32. The Explanatory Memorandum, with regard to the Right of Communication to the Public states in Point 1:

owner to exercise control over access by individual “members of the public.” As such, a “right to control access” can be said to emanate from the right of making available.<sup>98</sup>

The proposed Copyright Directive and the Copyright Treaty indicate that the right of making available is part of the right of communication to the public.<sup>99</sup> But was a “right to control access” already part of copyright law? Copyright holders have had the right of communication to the public prior to the Copyright Treaty for certain categories of work.<sup>100</sup> Thus, one can argue that a right of making available can also be said to have been part of copyright law.<sup>101</sup>

Moreover, by extending the argument above, one can also argue that a “right to control access” has been part of copyright law.<sup>102</sup> Indeed, by viewing the exclusive rights under copyright law in the aggregate, one can say that they together control access with the act of publication. That is, under copyright law, authorized access is not possible unless the work somehow has been made public through the exercise of an author’s exclusive rights. But as with the right of communication to the public, any

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“as in the *acquis communautaire*, it is a matter for the national law to define ‘public.’” *Id.* point 1. However, with regard to the making available portion of the right, the Memorandum states: “[t]he ‘public’ consists of individual ‘members of the public.’” *Id.*; see also SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986* 187 (1987) (in defining “public,” “[t]he essential requirement is that there is no limitation placed on the persons to whom the work is made available . . .”).

98. Professor Jane Ginsburg also makes this argument. Jane Ginsburg, *From Having Copies to Experiencing Works: the Development of an Access Right in U.S. Copyright Law*, in *U.S. INTELLECTUAL PROPERTY: LAW AND POLICY* (Hugh Hansen ed., 2000) (forthcoming), available at [http://papers.ssrn.com/paper.taf?ABSTRACT\\_ID=222493](http://papers.ssrn.com/paper.taf?ABSTRACT_ID=222493). It is submitted that referring to this as a “right to control access” is inaccurate. As what is at stake is simply the ability to change legal relations—that is authorize or prohibit access, it would be more accurate to refer to what is in issue as a “power” as defined under the Hohfeldian framework. See *supra* note 62.

99. See *supra* text accompanying notes 95-96.

100. See Berne Convention for the Protection of Literary and Artistic Works Paris Act of July 24, 1971 (as amended on Sept. 28, 1979), arts. 11(1)(ii), 11<sup>bis</sup>(1)(i), 11<sup>ter</sup>(1)(ii), 14(1)(ii), 14<sup>bis</sup>(1), available at <http://www.wipo.int/treaties/ip/berne/index.html> (last visited Nov. 17, 2000) [hereinafter Berne Convention].

101. See *WCT Basic Proposal*, *supra* note 96, art 10, note 10.13 (“The features that have been confirmed in the second half, the “making available” part of the provision, could fall within a fair interpretation of the right of communication in the existing provisions of the Berne Convention.”).

102. For an interpretation of the right of communication to the public as extending to access in the online environment, see ANDRÉ LUCAS, *DROIT D’AUTEUR ET NUMÉRIQUE* 134-41 (1998).

“right to control access” is pertinent vis-à-vis the public as a whole, and not necessarily individual “members of the public.” Instead, it is the rights of entrepreneurs exploiting a work and operating under the authorization of the copyright owner that have traditionally been directly relevant to individual access control. To be sure, these entrepreneurs—cinema operators, for instance—operate under the umbrella of authorization of the copyright owner, and vis-à-vis these entrepreneurs, the copyright owner can be said to enjoy a “right to control access” that is of direct relevance.

The right of making available is not unique to authors. Through the WIPO Performers and Phonograms Treaty (“WPPT”), neighboring rights holders, specifically performers and phonogram producers, also enjoy a similar right.<sup>103</sup> It also originates from a proposal of the EU Commission and its Member States to the WIPO Committee of Experts in 1996, and stands to become part of the *acquis communautaire* as Article 3(2) of the Copyright Directive.<sup>104</sup> Unlike the similar right contained within the WIPO Copyright Treaty, however, this is a “new” right.<sup>105</sup> It does not have any connection with a right of communication to the public, which for neighboring rights holders continues to be a right to remuneration and not an exclusive right.<sup>106</sup> However, like the author’s right of making available, it is an exclusive right<sup>107</sup> and extends to individual acts of access.<sup>108</sup>

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103. WIPO Performers and Phonograms Treaty, Dec. 20, 1996, arts. 10, 14, *available at* <http://www.wipo.int/eng/diplconf/distrib/95dc.htm> (last visited Nov. 19, 2000) [hereinafter WPPT].

104. Copyright Directive Common Position, *supra* note 2, art. 3(2), at 2.

Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

*Id.* Whereas the equivalent right under the WPPT is enjoyed by performers and phonogram producers, under the proposed Copyright Directive it also extends to producers of the first fixations of films and broadcasting organizations. WPPT, *supra* note 103.

105. See *Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Performers and Producers of Phonograms to Be Considered by the Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions*, WIPO Doc. CRNR/DC/5, draft arts. 11, 18 and notes 11.01, 18.01 (Aug. 30, 1996) [hereinafter *WPPT Basic Proposal*].

106. See WPPT, *supra* note 103, art. 15. This “Right to Remuneration for Broadcasting and Communication to the Public” updates Article 12 of the Rome Convention to cover both direct and indirect uses of phonograms for broadcasting or for communication to the public. See *WPPT Basic Proposal*, *supra* note 105, notes 12.01, 12.03, 12.04, 12.09.

107. *WPPT Basic Proposal*, *supra* note 105, note 11.09 (“The right proposed in Article 11 is an exclusive right. This is fundamental.”).

Accordingly, as the analysis above has demonstrated, it can also be said to contain a “right to control access” of direct relevance to individual members of the public.<sup>109</sup>

**C. The “Right to Control Access” under the Conditional Access Directive: Is it not a Neighboring Right?**

Even if one recognizes that it is only with the recent inclusion of the right of making available that both authors and neighboring rights holders have arguably become beneficiaries of a “right to control access” of direct relevance to individual access control, what is to say that the “right to control access” recognized in the Conditional Access Directive is not the equivalent of the “right to control access” found under either of these rights schemes? As stated above, the Commission makes clear that the Conditional Access Directive only indirectly protects radio and television broadcasting services and Information Society services which may or may not contain copyrighted material.<sup>110</sup> It directly protects the remuneration interest arising from the use of an access control mechanism. Protecting the conditional access mechanism itself, without considering the content contained therein, may contradict the conclusion that the “right to control access” in issue is similar to the one found under copyright law. However, does the same hold true for neighboring rights schemes?

Foremost, one needs to appreciate that what constitutes a neighboring rights scheme is far from concrete.<sup>111</sup> Traditionally, neighboring rights schemes, like copyright law, have focused on combating piracy.<sup>112</sup> Neighboring rights predominantly cover rights in derivative works because they presuppose a preexisting copyrighted work.<sup>113</sup> However, this need not be the case.

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108. *Id.* note 11.03 (“The right of making available is limited to situations where members of public may access fixed performances from a place and at a time individually chosen by them. Thus, availability is based on interactivity and on on-demand access.”); *see also* notes 11.05, 11.06, 11.08.

109. *See id.* note 11.04 “The proposed new right is designed to operate as a basic rule for the proper functioning of the electronic marketplace.”

110. *See supra* text accompanying note 87.

111. *See supra* note 2.

112. STEWART, *supra* note 2, at 270 (“The piracy of literacy and artistic works led to the Berne Convention protecting authors. The piracy of recordings led to the Phonogram Convention protecting producers of phonograms. There was now a need for the protection of broadcasting organisations.”).

113. This insight can be appreciated when it is recognized that neighboring rights are commonly enjoyed by intermediaries disseminating or otherwise making an author’s work available to the public. *See STEWART supra* note 2, § 7.11, at 190.

Faced with the problem of piracy in the broadcasting industry, the international community promulgated the Satellite Convention of 1974.<sup>114</sup> The Convention, unlike other neighboring rights conventions, explicitly extends no private rights of any kind.<sup>115</sup> Instead, it seeks to protect the satellite signal which carries a broadcasted program, and not the program itself.<sup>116</sup> It does this by imposing an obligation on Contracting States to take adequate measures to prevent the distribution on or from their territory of any program-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended.<sup>117</sup>

One may therefore recognize several similarities between the Satellite Convention and the Conditional Access Directive. First, the Convention implicitly recognizes the existence of property interests in the satellite signal itself, including the "right to authorize or control access" to the satellite signal, at least with respect to other broadcasting organizations. This is similar to the Conditional Access Directive's recognition of property interests in access control technology as discussed in Part III.A. Second, in protecting against piracy, both instruments seek to protect the remuneration interest associated with the use of a "container," whether a satellite signal or the infrastructure provided by the access control technology. Third, both instruments protect the container, regardless of the content, which may or may not prove subject to copyright. Any protection, however, is limited to those satellite signals that carry "programmes" or conditional access mechanisms that provide access to "protected services."<sup>118</sup> Accordingly, if one can classify the type of rights scheme existing under the Satellite Convention as a neighboring rights scheme, one can argue

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114. Convention Relating to the Distribution of Programme-carrying Signals Transmitted by Satellite, May 6-21, 1974, 13 I.L.M. 1444 [hereinafter *Satellite Convention*]. As of January 14, 2000, twenty-four States, including Germany, Austria, Portugal, and the United States, were parties to the Convention. *Id.*; see also STEWART, *supra* note 2, § 10.02, at 270.

115. STEWART, *supra* note 2, § 10.07, at 275.

116. *Id.* § 10.04, at 272. Article 1 defines "signal" as "an electronically-generated carrier capable of transmitting programmes;" and "programme" as "a body of live or recorded material consisting of images, sounds or both, embodied in signals emitted for the purpose of ultimate distribution; . . ." *Satellite Convention*, *supra* note 114, art. (1)(i)-(ii).

117. *Satellite Convention*, *supra* note 114, art. 2(1).

118. *Report of the General Rapporteur*, reprinted in RECORDS OF THE INTERNATIONAL CONFERENCE OF STATES ON THE DISTRIBUTION OF PROGRAMME-CARRYING SIGNALS TRANSMITTED BY SATELLITE, BRUSSELS, 6-21 MAY 1974, at 50, para. 64 [hereinafter *Satellite Report*]; see Conditional Access Directive, *supra* note 9, art. 2, at 56.



that the rights structure recognized by the Conditional Access Directive can also be classified as such.<sup>119</sup>

#### D. Evaluation

This Part has argued that a “right to control access” can emanate from different rights schemes, including copyright and neighboring rights. There is little question that the “right to control access” is of paramount importance, particularly in the digital environment. It is unclear, however, whether it really is necessary to recognize the equivalent of cinema and theatre access control mechanisms in cyberspace. In short, the digitally networked environment provides the possibility of direct access to information products; there is no structure, whether cinema, theatre, or library building from which to gain access. It is only if we choose to recognize property interests in access control technology that the equivalent of these tangible world infrastructures comes to exist in the digitally networked environment.<sup>120</sup>

Although not explicitly analyzed in this Article, the “right to control access” found under copyright and neighboring right schemes both seem perfectly well-suited to address the issues of rights holders in the digital environment. The fact that we are dealing with “services,” and not tangible copies, only makes this “right to control access” more relevant. Even if one recognizes that not all material delivered as part of a “service” is subject to copyright, this does not mean that it is necessary to go completely outside copyright and neighboring rights schemes to find protection for it. As demonstrated above, neighboring rights schemes can provide protection for the container without regard to the content contained within.

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119. The EU Green Paper on Legal Protection for Encrypted Services also seems to recognize the existence of a relationship between conditional access providers and rights holders similar to that existing between more conventional exploiters of copyrighted works, including neighboring rights holders and copyright owners:

Since the fees paid to rightholders generally also take into account the potential audience, the fact that encrypted programmes are picked up via illicit reception deprives rightholders of the income they would have received from subscription revenue if the customer had purchased an authorized decoder instead. Moreover, when negotiations take place regarding rights in respect of subsequent (in clear) broadcasts, rightholders will find it more difficult to secure high levels of remuneration because of illicit reception which had already occurred when the material was broadcast on the encrypted channel.

Encrypted Services Green Paper, *supra* note 37, at 18-19.

120. This equivalent is the website and the technological protection measures used to protect the site.

## V. THE APPLICABILITY OF COPYRIGHT LAW: DOES IT MATTER?

There are good reasons for electing to keep the protection provided by the Conditional Access Directive within copyright and neighboring rights rather than offering vendors of information products the possibility of an alternative rights structure. As this Part will show, particularly for creators and innovators, the applicable rights scheme matters greatly.

### A. Copyright Law and Innovation-Driven Competition

Copyright law at its core promotes innovation.<sup>121</sup> The TRIPS and WIPO Copyright Treaty have internationally recognized that copyright protection extends to expression and not to ideas.<sup>122</sup> Valuable ideas are accordingly available for others, including competitors, to use as basic building blocks in their creative endeavors. But copyright law enables reuse of material beyond the idea level. Modern copyright law generally has exceptions permitting the use of insubstantial segments of copyrighted material, such as quotations.<sup>123</sup> Parody exceptions allow even more expansive uses of this material.<sup>124</sup> As a specific example, the EU Computer Program Directive permits the reuse of computer interface specifications.<sup>125</sup>

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121. That innovation brings about competition is perhaps most famously recognized in Joseph Schumpeter's book. Schumpeter stressed that potential competition from new products and processes is the most powerful form of competition, stating  
in capitalist reality, as distinguished from its textbook picture, it is not that kind [price] of competition that counts but the competition that comes from the new commodity, the new technology, the new source of supply. . . . This kind of competition is much more effective than the other as bombardment is in comparison with forcing a door, and so much more important that it becomes a matter of comparative indifference whether competition in the ordinary sense functions more or less promptly.

JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 84-85 (1942).

122. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, art. 9.2, 108 Stat. 4809, 33 I.L.M. 81 [hereinafter TRIPS]; Copyright Treaty, *supra* note 71, art. 2.

123. See, e.g., the fair use doctrine under U.S. copyright law. 17 U.S.C. § 107 (1994).

124. See, e.g., *Campbell v. Acuff-Rose Music, Ltd.*, 510 U.S. 569 (1994).

125. Computer Program Directive, *supra* note 22, art. 6, at 45. Recital 11 of the Directive defines "interfaces" as the parts of a computer program which provide for the type of interconnection and interaction between elements of software and hardware which permit all elements of software and hardware to work with other software and hardware and with users in all the ways in which they are intended to function. *Id.* recital 11, at 43. The reuse of interface specifications is permitted for the purpose of obtaining interoperability which is defined in recital 12 of the Directive as "the ability to exchange information and mutually to use the information which has been exchanged." *Id.* recital 12, at 43.

All of these limitations and exceptions enable a new generation of creators to make use of already existing material, thereby encouraging innovation.

Innovation encouraged by these limitations and exceptions increases the substitution of information products through shared material. Depending on the amount of shared material, such substitution will take place to varying degrees and will not be immediately present. Because copyright law generally leaves only the most basic building blocks unprotected, innovators must invest time and effort to bring information products to the marketplace. As such, the law privileges the rights holder with lead-time advantage, a period during which he is able to exploit his information product without the next generation of information products appearing on the market.

Copyright law also stimulates competition by promoting substitution between information products.<sup>126</sup> But this type of competition has boundaries, as copyright law provides a check by sanctioning infringing products.<sup>127</sup> Even permissible competition, however, stimulates rivalry, thereby forcing the rights holder to evaluate the entire market presentation of his information product and to compete not only on price but also on features.<sup>128</sup> Such competitive pressures may also reach contractually specified terms of use and those features controlled by technical protection devices, including access control.

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126. Copyright law contains both competition promoting and competition restricting aspects. See Michael Lehmann, *The Theory of Property Rights and the Protection of Intellectual and Industrial Property*, 16 INT'L REV. INDUS. PROP. COPYRIGHT L. 525, 538 (1985) (stating that intellectual and industrial property may be viewed as a specific competitive restriction on the production level for the benefit of competition on the innovation level). However, Lehmann's contribution is distinguishable because he limits his consideration to the type of competition where producers offer the *same* intangible and not where competition arises from rivalry between legally permissible substitutes, as is in issue here.

127. While the law seeks to ensure that the rights holder's work will be free from free-riding, it does not guarantee that the work will be free from competition. While all uses arguably entail some degree of free-riding, the free-riding referenced here involves copying a work in its entirety, or nearly so, and presenting it to the marketplace as a substitute for the original work. There is accordingly a need to more finely distinguish types of free-riders or "pirates," another term often used to evoke a calculated response. See generally Justice Laddie, *Copyright: Over-Strength, Over-Regulated, Over-Rated*, 18 EUR. INTELL. PROP. REV. 253, 260 (1996).

128. "[Competition] disciplines before it attacks. The businessman feels himself to be in a competitive situation even if he is alone in his field . . ." SCHUMPETER, *supra* note 121, at 85. For a discussion encouraging information vendors to take advantage of the possibilities provided by digital technology and the Internet, see generally SHAPIRO & VARIAN, *supra* note 73 (encouraging information vendors to take advantage of the possibilities provided by digital technology and the Internet).

Resulting competitive pressures arguably bring about a need to innovate to remain viable in the market. Consequently, there is a constant demand for limitations and exceptions which promote innovation. The ability of any rights holder to remain competitive, whether a rights holder of already created information products or a new creator, depends on the availability of such copyright limitations and exceptions.

### **B. EU Recitals on “Competitiveness” and “Innovation”**

Clearly, copyright law is important to innovation, particularly because of its limitations and exceptions, but what is the EU’s view? An overview of Directive recitals contained in the emerging EU Electronic Commerce framework makes clear that each of those four Electronic Commerce Directives (the E-Commerce Directive, the Electronic Signatures Directive, the proposed Copyright Directive, and the Conditional Access Directive) whether final or proposed, contain a recital on “competitiveness.”<sup>129</sup> Of crucial importance, the Copyright Directive Common Position recognizes that competitiveness is linked to the ability to innovate. In addition, it recognizes that being able to innovate, in turn, depends on the protection provided by the copyright rights scheme:

A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.<sup>130</sup>

The recognized relationships between copyright protection and innovation, and between innovation and competitiveness, seem logical. Notably, the EU recognizes the importance of copyright law in relation to innovation. The relationship between copyright protection and competitiveness is, however, less certain. Competitiveness may be restrained where

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129. Conditional Access Directive, *supra* note 9, recital 8, at 54; Regulatory Transparency Directive, *supra* note 24, recital 3, at 18; E-Commerce Directive, *supra* note 9, recital 2, at 1; E-Signatures Directive, *supra* note 9, recital 9, at 12; Copyright Directive Common Position, *supra* note 2, recital 4, at 2. “Competitiveness” is not defined in any of the Directives. It is an imprecise term of art that may be interpreted in different ways. See Paul Krugman, *Competitiveness: A Dangerous Obsession*, FOREIGN AFFAIRS Mar.-Apr. 1994, at 28.

130. Copyright Directive Common Position, *supra* note 2, recital 4, at 3.

the legal system stifles, rather than promotes, innovation. This depends on what exactly is meant by a “high level of protection,” as referred to in the recital above. In short, if the level of legal protection is too high, it may impede creation and innovation.<sup>131</sup> Accordingly, if one finds the argument persuasive that competitiveness depends significantly on the ability to innovate, which in turn depends on legal provisions supporting such innovation, then a “high level of protection” must include the innovation-promoting limitations and exceptions found under copyright law. This in turn would attain the Community’s goal of improving the competitiveness of its industry.

### C. The Effect of Access Control on Innovation-Driven Competition

Although access control enables a rights holder to fine tune the type of access available to a user, the rights holder will nonetheless make available some degree of access. After all, the rights holder is not in business to deny access completely. Contractual provisions and technical measures can, however, discourage or disable certain uses, thereby affecting the practical application of copyright limitations and exceptions.<sup>132</sup>

In the case of limitations and exceptions which promote innovation, the incentive to make use of access control mechanisms may be particularly high. A rights holder of an already created information product plainly wants to limit the entrance of competing information products into his market. This will prevent the rights holder’s competitor from either competing with his existing products and/or deriving benefit from the network of information products, including the rights holder’s product.<sup>133</sup> Succinctly put, ideas and other building blocks are valuable; allowing unfettered access to them may invite unwelcome competition with a rights holder’s information product. One should therefore expect that the rights holder of the already created information product will use whatever means he has at his disposal, including technical protection measures and contracts, to target such limitations and exceptions and therefore prevent or minimize competitive information products from coming to market. If

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131. See *supra* text accompanying note 5.

132. For a discussion of this issue, see LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 135 (1999) (“Code displaces the balance in copyright law and doctrines such as fair use.”).

133. It should be plain that the rights holder has an interest in minimizing the potential of competition coming about as he is in a better position to charge higher prices and dictate terms of use. Accordingly, the interests of society and rights holders diverge when society has an interest in maximizing competition and rights holders have the opposite interest.

such practices become widespread, the overall effect on innovation is likely to be negative.<sup>134</sup>

The discussion above assumes the applicability of copyright law. Where copyright is not applicable, as discussed in Part III, the issue of limitations and exceptions does not even arise. In such an instance, the effect on innovation is uncertain at best.<sup>135</sup>

#### D. EU Recitals on "Access"

A review of the EU recitals reveals some recognition of the importance of access. While not recognized in the proposed Copyright Directive, the E-Commerce Directive recognizes that both competitiveness and innovation are linked with some form of access:

... the development of electronic commerce within the Information Society offers significant employment opportunities in the Community, particularly in small and medium-sized enterprises, and will stimulate economic growth and investment in *innovation* by European companies, and can also enhance the *competitiveness* of European industry, *provided that everyone has access to the Internet*.<sup>136</sup>

Appreciation of the importance of access is more evident in recital proposals concerning "balance."<sup>137</sup> Of note is proposed Recital 16a of the Conditional Access Directive, which states that a balance must be secured in relation to the general public's interest "not to be excluded more and

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134. For example, any review of shrink-wrap or click-wrap licenses quickly reveals that contractual restrictions of reverse engineering are commonplace.

135. It is uncertain because not all innovation is dependent upon the availability of copyright limitations and exceptions.

136. E-Commerce Directive, *supra* note 9, recital 2, at 1 (emphasis added). This reference to access presumably means that some form of access to information and information products is included. *See also* Regulatory Transparency Directive, *supra* note 24, recital 3, at 12 (recognizing the link between access and competitiveness).

137. Some references are very general. For example, the E-Signatures Directive refers only to the general need to strike a balance between consumer and business needs. E-Signatures Directive, *supra* note 9, recital 14, at 13. The E-Commerce Directive indicates a need to strike a balance between the different interests at stake. E-Commerce Directive, *supra* note 9, recital 41, at 6. The proposed Copyright Directive is quite ambiguous, referring to the need to safeguard a "fair balance" between different categories of rights holders and users. Copyright Directive Common Position, *supra* note 2, recital 31, at 10; *see also* Copyright Directive Common Position, *supra* note 2, recital 40, at 13 (encouraging the use of contracts or licenses to exploit information products in libraries and similar institutions but mindful of the possibility of creating imbalances). How "balance" is to be achieved is not addressed in any of these recitals.

more from information and cultural events.”<sup>138</sup> While no reason is apparent from the legislative history, this recital, perhaps due to its inelegant drafting, has not become part of the legal framework.<sup>139</sup>

### E. Evaluation

In all, the EU recitals note the importance of competitiveness and innovation and copyright law’s role in promoting both. As the proposed Copyright Directive does not discuss the importance of access, however, the framework’s overall approach to innovation and competitiveness is somewhat less certain. If read together, though, the recitals advance a reasonable proposition: both access and copyright protection are important to innovation and overall competitiveness. Moreover, references to “balance” do, at the very least, indicate the Community’s recognition of a need for a balanced EU Electronic Commerce framework. Such a framework would presumably include balances and tradeoffs concerning access similar to those currently applicable in the world of physical artifacts.

In light of the Green Paper on Encrypted Services’ recognition of the power of access control technology,<sup>140</sup> there is a need to keep access control within, or somehow regulate it by, copyright and neighboring rights schemes. Unless one can demonstrate otherwise, copyright law provides a sound model for innovation and results in positive effects on competition. It should therefore provide the applicable set of property rights in the information economy. Moreover, the passive type of use and consumption featured as part of the cinema and theatre access control model underlying

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138. Conditional Access Directive, *supra* note 9, recital 16a, at 15 (“Whereas a balance must be secured between the interest of the service providers and copyright holders to be remunerated for their services (by encryption) on the one hand and the interest of the general public not to be excluded more and more from information and cultural events. . .”).

139. More illuminating, if somewhat obscure, is the European Parliament’s proposed recital 6a to the E-Commerce Directive Amended Proposal stating “. . . whereas the legal framework for Information Society Services should not differ overly from the current rules on other ways of exploiting works so as not to create distortions of competition.” EP Report A4-0248/99, *supra* note 12, amend. 8, at 68. This recital seems to indicate that the balance of interests underlying the current legal framework—presumably “analogue” copyright law—should similarly apply to the “new” digital framework. It was also rejected but for a very specific reason: “[it] refer[s] to a specific matter such as copyright which would seem superfluous in the context of this proposal, which is of a horizontal nature, and could be misinterpreted.” Explanatory Memorandum to Amended Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, point 2.3.1, COM(99)427 final at 7.

140. Encrypted Services Green Paper, *supra* note 37, at 10-21, 25-33 (“Due to advanced technology, it is in theory now possible to use a conditional access system providing such a high level of security that pirates would be incapable of breaking it.”).

the Conditional Access Directive is not convincing for the types of works already available on the Internet. This model is even less convincing when applied to the type of information products that soon will be provided as part of Information Society services.

## VI. INTERRELATIONSHIP BETWEEN COPYRIGHT AND NEIGHBORING RIGHTS SCHEMES

Having presented the case for the Conditional Access Directive as a neighboring rights scheme in Part IV and made the case for the importance of copyright law to innovation in Part V, this Part focuses on how the interrelationship between copyright and neighboring rights schemes is set out in applicable international conventions and the EU *acquis communautaire*. As will be shown, this interrelationship involves two main aspects: first, clauses safeguarding copyright which are used to maintain the integrity of copyright law by keeping alternative rights structures from being established, and second, the existence of exceptions and limitations which, because they are similar in nature to exceptions and limitations found under copyright law, likewise assist in promoting innovation. While the EU *acquis communautaire* largely follows the international approach, it will be demonstrated that the type of interrelationship specified under the Conditional Access Directive is uncertain. It is on this basis that specific recommendations for implementation of the Directive are made in the Conclusion.

### A. Safeguard Measures under Neighboring Rights Conventions

Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.<sup>141</sup>

The Rome Convention first introduced this language with the express intention of maintaining the integrity of copyright.<sup>142</sup> The most recent international convention in this area, the WIPO Performances and Phono-

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141. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Oct. 26, 1961, art. 1, available at [http://www.wipo.int/eng/iplex/wo\\_rom0\\_.htm](http://www.wipo.int/eng/iplex/wo_rom0_.htm) (last visited Nov. 19, 2000) [hereinafter Rome Convention]. WPPT, *supra* note 103, art. 1(2), Agreed Statement Concerning Article 1 ("Article 1(2) clarifies the relationship between rights in phonograms under this Treaty and copyright in works embodied in the phonograms.").

142. CLAUDE MASOUYÉ, GUIDE DE LA CONVENTION DE ROME ET DE LA CONVENTION PHONOGRAMMES 16 (1981).



grams Treaty, also contains identical language. Articles containing similar language are found in other neighboring rights conventions, including the Phonograms Convention and the Satellite Convention of 1974.<sup>143</sup> With regard to the Satellite Convention, it is important to note that despite the Convention not granting any private rights as such, the inclusion of a safeguard clause was nevertheless considered “integral” to the treaty negotiations.<sup>144</sup> Thus, even where the applicable instrument protects the “container” and not the “content” within, it was considered important to include a clause safeguarding copyright.<sup>145</sup> Nonetheless, the above language does not proclaim that neighboring rights may never be stronger in content or scope than those enjoyed by authors.<sup>146</sup> In addition, it serves as a guide to Contracting States legislating on national neighboring rights situations, by indicating that they are not allowed to legislate in ways that affect the protection of copyright.<sup>147</sup>

While the safeguard measure does not ensure the applicability of copyright law, it does ensure that if copyright is applicable, nothing under the neighboring rights convention may affect the rights of copyright owners.<sup>148</sup> The use of the phrase “protection of copyright” makes this point

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143. Article 6 of the Satellite Convention states: “This Convention shall in no way be interpreted to limit or prejudice the protection secured to authors, performers, producers of phonograms, or broadcasting organizations, under any domestic law or international agreement.” Satellite Convention, *supra* note 114, art. 6. For similar language, see also Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms of October 29, 1971, art. 7(1), available at [http://www.wipo.int/eng/iplex/wo\\_pho0\\_.htm](http://www.wipo.int/eng/iplex/wo_pho0_.htm) (Nov. 19, 2000) [hereinafter Phonograms Convention].

144. *Satellite Report*, *supra* note 118, at 63, para. 113.

145. This is significant because, as pointed out earlier, there are strong similarities in the type of protection afforded by the Satellite Convention and the Conditional Access Directive, including the rights structure in issue, which protects the container and not the content within. See text accompanying notes 115-118. However, as is pointed out in Part VI.E, the Conditional Access Directive does not contain a safeguard clause.

146. MASOUYÉ, *supra* note 142, at 17.

147. *Id.* at 18 (indicating that where a right to remuneration is translated into an exclusive right there is conflict with the author’s exclusive right and prejudice to it. This position is significantly weakened when it is further indicated that doing so “might bring the legislator into conflict with the safeguard for copyright in Article 1, according to one school of thought.”).

148. RICKETSON, *supra* note 97, at 877 (“As a statement of principle, this is clear enough: nothing under the Rome Convention is to be interpreted as affecting the legal situation of copyright owners. In a sense, this may seem superfluous as the Convention, which does not deal with authors’ rights, could not affect these rights.”).

Not only do the neighboring rights conventions not ensure the applicability of copyright law, there is nothing to require protection under any of these conventions. See Rome Convention, *supra* note 141, art. 21 (“The protection provided for in this Conven-

clear. Of particular relevance to this Article is the question of whether "protection of copyright" also includes the limitations and exceptions commonly found under copyright laws. If it does, neighboring rights conventions may neither prejudice the exclusive rights found under copyright law nor the limitations and exceptions to those rights.<sup>149</sup> Because the various limitations and exceptions define, in part, the scope of copyright protection, there is a basis for such an argument. If not for these various limitations and exceptions, certain uses would fall under the protection granted copyright owners and subject the user to copyright infringement liability.

However, even if one can state that "protection of copyright" includes limitations and exceptions, these safeguard measures still only apply to copyright.<sup>150</sup> Therefore, if copyright law is not the applicable rights scheme, there is no "protection" to prejudice.<sup>151</sup> And even if copyright is applicable, there may be other rights to which these limitations and exceptions do not apply, unless specified to be of mandatory effect or so interpreted.<sup>152</sup> For example, in the case of a copyrighted work broadcast via satellite, copyright limitations and exceptions apply to the author's rights in the work, but not to any rights of the broadcasting organization. As such there may be the need for separate limitations and exceptions to the rights of the neighboring rights holder.

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tion shall not prejudice any protection otherwise secured to performers, producers of phonograms and broadcasting organisations."). In similar vein, according to Masouyé, the language found in Article 7(1) of the Phonograms Convention is a combination of Articles 1 and 21 of the Rome Convention. MASOUYÉ, *supra* note 142, at 107; *see also* WPPT, *supra* note 103, art. 1(3) ("This Treaty shall not have any connection with, nor shall it prejudice any rights and obligations under, any other treaties.").

149. RICKETSON, *supra* note 97, at 836 ("None of these [neighboring rights] conventions stands in contradiction to the Berne Convention: on the contrary, each can be seen as an important supplement to the international system of protection established by that Convention.").

150. In the case of the Phonograms and Satellite Conventions, it is not just copyright law which is safeguarded. MASOUYÉ, *supra* note 142, at 107 ("Though not specified, the relevant international agreements are the Berne and Universal Conventions on Copyright, the Rome Convention on Neighbouring Rights and the Paris Convention for the Protection of Industrial Property (particularly Article 10<sup>bis</sup> (2)) as concerns unfair competition."). With regard to the Satellite Convention, the General Report references domestic law, either of the Copyright Conventions, or the Rome Convention. *Satellite Report*, *supra* note 118, at 63, para. 113.

151. As is argued herein, this is presently the case under the Conditional Access Directive.

152. This is the case under the EU Computer Program and Database Directives where certain provisions are of mandatory effect. *See supra* note 75. A similar situation may arise where a court interprets a limitation or exception to primarily concern freedom of expression, for instance.

## B. Safeguard Measures under EU Directives

An examination of the *acquis communautaire* reveals that the Directives addressing neighboring rights, referred to as “related rights” under EU Directives, follow the approach of the international conventions in specifying the relation between copyright and copyright-related rights. The Rental Rights Directive, the Cable and Satellite Directive, and the proposed Copyright Directive contain the following language: “Protection of copyright-related rights under this Directive shall leave intact and shall in no way affect the protection of copyright.”<sup>153</sup>

Safeguard measures under the EU Directives, however, are not limited to the above format; the Community also uses the phrase “without prejudice to” as a safeguard.<sup>154</sup> Using this phrase indicates that the Directive in issue does not take precedence over—or become subordinate to—other Directives, provisions or rights schemes, with the exception of Directive provisions declared to be of mandatory application. Thus, the EU explicitly declares Article 7 of the Computer Program Directive to be “without prejudice to” both the rights and exceptions found under that Directive, thereby introducing what can be classified as a “technology” safeguard measure.<sup>155</sup> This type of safeguard measure not only permits the act of cir-

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153. Rental Rights Directive, *supra* note 22, art. 14; Cable and Satellite Directive, *supra* note 22, art. 5; Copyright Directive Common Position, *supra* note 2, art. 12(2). The Explanatory Memorandum states that this wording brings the Article’s wording “into line with the *acquis communautaire*.” CRD-Amended Proposal, *supra* note 76, at 10.

154. In safeguarding “old” from “new” copyright, the original proposal for a Copyright Directive in Article 1.2 uses the following language: “Unless otherwise provided, this Directive shall apply without prejudice to existing Community provisions relating to: . . .” The Common Position uses clearer language: “Except in the cases referred to in Article 11, this Directive shall leave intact and shall in no way affect specific existing Community provisions relating to: [the copyright and related rights *acquis communautaire*].” See also Copyright Directive Common Position, *supra* note 2, recital 50, at 16 (stating that the proposed Copyright Directive does not affect the specific provisions of protection provided by the Computer Program Directive; “It should neither inhibit nor prevent the development or use of any means of circumventing a technological measure that is necessary to enable acts to be undertaken in accordance with the terms of Article 5(3) or Article 6 [Decompilation] of Directive 91/250/EEC.”).

That the phrase “without prejudice to” is to be considered as a safeguard measure is also evident from records of the internal market council meeting of June 18, 1992, where “safeguarding Article 2(7)” of the Rental Rights Directive with respect to Article 10(2) of the same Directive by using this phrase was discussed. See JORG REINBOTHE & SILKE VON LEWINSKI, THE EC DIRECTIVE ON RENTAL AND LENDING RIGHTS AND ON PIRACY 109 n.93 (1993).

155. Computer Program Directive, *supra* note 22, art. 7(1), at 45 states: Without prejudice to the provisions of Articles 4, 5 and 6, Member States shall provide, in accordance with their national legislation, ap-

cumvention, but also allows the manufacture of devices that enable a user to benefit from the exceptions found under Article 5 and 6 of the Computer Program Directive.

The Database Directive also uses the term "without prejudice to." With regard to the *sui generis* right introduced under the Directive, i.e., the right to prevent unauthorized extraction and/or reutilization of a database, the approach to declaring a relationship with copyright is two-pronged. First, the Directive is declared to be "without prejudice to" the Computer Program, the Rental Rights, and the Term Directives.<sup>156</sup> The Directive further states that the right shall apply irrespective of the eligibility of the database or its contents, for protection by copyright or by other rights.<sup>157</sup> Second, the Database Directive specifically delimits the boundaries of the *sui generis* right. Specifically, it sets out the intended use of the right, which is to give the maker of a database the option of preventing the unauthorized extraction and/or reutilization of all, or a substantial part, of the contents of his database.<sup>158</sup> Moreover, the Directive plainly states that the right does not in any way constitute an extension of copyright protection to mere facts or data.<sup>159</sup> Further, it specifically states that the *sui generis* right "should not give rise to the creation of a new right in the works, data or materials themselves."<sup>160</sup>

The Community legislators broadly use the approach of declaring Directives "without prejudice to" other Directives, measures, or rights schemes.<sup>161</sup> While usage of the phrase may indicate—in line with relevant

appropriate remedies against a person committing any of the acts listed in subparagraphs (a), (b) and (c) below:

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(c) any act of putting into circulation, or the possession for commercial purposes of, any means the sole intended purpose of which is to facilitate the unauthorised removal or circumvention of any technical device which may have been applied to protect a computer program.

156. Database Directive, *supra* note 22, recitals 23-25, at 21, and art. 2, at 24.

157. *Id.* recital 18, at 21, and art. 7.4, at 26.

158. *Id.* recital 41-42, at 23.

159. *Id.* recital 45, at 23.

160. *Id.* recital 46, at 23.

161. Certain Directives are declared without prejudice to the EU competition laws. See Computer Program Directive, *supra* note 22, recital 27, at 43; Database Directive, *supra* note 22, recital 47, at 23; Conditional Access Directive, *supra* note 9, recital 21, at 55. This is arguably also the case in recital 18 of the Copyright Directive Common Position, *supra* note 2, at 7, which references the compliance of collecting societies with competition rules. The phrase is also used to denote the relationship between Directives addressing intellectual property rights. In addition to the text above, the Amended Proposal for the Copyright Directive declared itself without prejudice to the Designs Direc-

international conventions—that protection through other rights schemes is available,<sup>162</sup> there is at least some indication that Community bodies may not be entirely satisfied with using the “without prejudice to” phrase as a safeguard measure.<sup>163</sup>

### C. Limitations and Exceptions under International Neighboring Rights Conventions<sup>164</sup>

In line with the argument in Part VI.A. that distinct limitations and exceptions are necessary for rights separate to—but possibly enjoying some relationship with—copyright, a review of the neighboring rights conventions indicates that they all address the issue of limitations and exceptions. Originating with the Rome Convention, each subsequent Convention either specifically lists the exceptions or contains a general provision which makes them permissible. The Rome Convention, however, includes both

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tive. See CRD-Amended Proposal, *supra* note 76, recital 13<sup>bis</sup> at 8. The approach is also used to declare Directives or provisions addressing intellectual property rights without prejudice to access control measures. Thus, the proposed Copyright Directive is declared without prejudice to the Conditional Access Directive. See Copyright Directive Common Position, *supra* note 2, recital 59, at 22. In addition, the proposed Copyright Directive Article 5(2) (b<sup>bis</sup>), addressing the exception for digital private copying of audio and audiovisual material, declared itself without prejudice to “operational, reliable and effective technical means capable of protecting the interests of the rightholders.” The language of the Common Position states this more generally in referring to the “application or non-application of technological measures.” Copyright Directive Common Position, *supra* note 2, recital 13, at 5, and art. 5(2) (b), at 22. All exceptions found in Article 5(2) and 5(3) are arguably declared without prejudice to contractual provisions in recital 45 which states: “The exceptions and limitations referred to in Article 5(2), (3) and (4) should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law.” *Id.* at 24-27.

162. Both the Computer Program and Database Directives declare their provisions to be without prejudice to other legal provisions and rights schemes, including patent rights, trade secrets and the law of contract. Database Directive, *supra* note 22, art. 13, at 27; Computer Program Directive, *supra* note 22, art. 9.1, at 45. Although both provisions are nonexhaustive in their reference to other legal provisions and rights schemes, the Computer Program Directive, in recital 26, states that it shall be without prejudice to the application, “in appropriate cases,” of other forms of protection. *Id.* art. 26, at 49. What constitutes an “appropriate case” is not elaborated anywhere in the Directive.

163. Note the change in language used in article 1.2 of the proposed Copyright Directive as referred in *supra* note 154. “Without prejudice to,” however, is still used in the recital. Copyright Directive Common Position, *supra* note 2, recital 20, at 7.

164. STERLING, *supra* note 2, at 777 (“There is, however, in international usage, no clear distinction between what constitutes a “limitation” and an “exception.”). “Limitations” and “exceptions” are to be distinguished from any exclusion of protection.

approaches. The TRIPS Agreement confirms that any Member may provide for exceptions to the extent permitted by the Rome Convention.<sup>165</sup>

Both the Rome and Satellite Conventions specifically set forth certain limitations and exceptions formulated in the same way as in the Berne Convention.<sup>166</sup> Rome Article 15(1) contains four limitations which are applicable to all three categories of beneficiaries: performers, phonogram producers, and broadcasting organizations.<sup>167</sup> First, sub-paragraph (a) of Article 15 permits private use.<sup>168</sup> Second, Article 15(1)(b), modeled on Berne Article 10<sup>bis</sup>, permits the use of short extracts in connection with the reporting of current events.<sup>169</sup> Third, sub-paragraph (c), modeled on paragraph 3 of Berne Article 11<sup>bis</sup>, permits ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts.<sup>170</sup> Finally, Article 15(1)(d), modeled on Berne Article 10(2), permits use solely for the purposes of teaching or scientific research.<sup>171</sup>

Similarly, the Satellite Convention sets forth three specific exceptions in Article 4.<sup>172</sup> Paragraph (i) permits short excerpts from the reports of current events provided they are "justified by the informatory purpose."<sup>173</sup> Paragraph (ii) exempts short excerpts of programs carried as "quotations."<sup>174</sup> Finally, paragraph (iii) exempts the whole program if the contracting state is a developing country and the distribution is "solely for the purpose of teaching . . . or scientific research."<sup>175</sup> Again, all three exceptions are modeled on Berne Articles 10 and 10<sup>bis</sup>.<sup>176</sup>

165. TRIPS, *supra* note 122, art. 14.6.

166. *See* Berne Convention, *supra* note 100. Berne is the primary international convention for the protection of copyright or authors' rights. As of October 15, 2000, Berne had 147 Contracting States. *See id.*

167. Rome Convention, *supra* note 141, art. 15(1).

168. MASOUYÉ, *supra* note 142, at 57 (" . . . private use. It follows the copyright pattern meaning use other than public use or use for profit . . .").

169. *Id.* at 57 ("The model is in Article 10<sup>bis</sup> of the Berne Convention which many countries have followed.").

170. *Id.* at 58 ("This, like the others, follows the Berne Convention (paragraph 3 of Article 11<sup>bis</sup>) and the same considerations apply as in copyright proper . . .").

171. *Id.* ("Again the multilateral copyright conventions provide the model. . . the Berne Convention in its Article 10(2) . . . It seems likely that, if called upon to decide on the scope of this exception, the courts would be guided by the spirit of the rules applicable to copyright.").

172. Satellite Convention, *supra* note 114, art. 4.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

As indicated, the international approach is not limited to setting forth specific limitations and exceptions. Using a general approach, Article 15(2) of the Rome Convention permits Contracting States to provide at the national level for the same kinds of limitations or exceptions regarding the protection of performers, producers of phonograms, and broadcasting organizations, as it provides in connection with the protection of copyright in literary and artistic works in its domestic laws and regulations.<sup>177</sup>

The Phonograms Convention and the WIPO Performances and Phonograms Treaty have adopted this approach with regard to the protection of beneficiaries under these treaties.<sup>178</sup> Significantly, the WIPO Commentary to the Rome Convention, while indicating that Article 15(2) is merely an option given to Member countries, and that they are under no obligation to create an exact equivalent, states that the provision was intended to act as a hint to the Member States that they should in principle consider treating both copyright and neighboring rights equally with respect to limitations and exceptions.<sup>179</sup>

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177. Rome Convention, *supra* note 141, art. 15.2. This paragraph applies irrespective of paragraph 1. *Id.* The WIPO Guide indicates that “[t]his paragraph permits provisions in national laws allowing exceptions other than those set out in paragraph 1 above if those laws provide for such exceptions. . . .” MASOUYÉ, *supra* note 142, at 58. Such an interpretation would seem to require the existence of exceptions equivalent to those found under Article 15(1) Rome in order for those exceptions to be applicable. As the general approach of Article 15(2) Rome has been adopted most recently in the WPPT, such an interpretation seems unlikely.

178. Phonograms Convention, *supra* note 143, art. 6. WPPT, *supra* note 103, art. 16(1); *see also* WPPT *Basic Proposal*, *supra* note 105, notes 13.02, 20.02 (“Paragraph 1 reproduces the main principle of Article 15.2 of the Rome Convention.”). Under the WPPT, this applies to the protection of performers and producers of phonograms. Moreover, WPPT, Article 16(2) requires that Contracting Parties confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram. *See also* WPPT, *supra* note 103, Agreed Statements of the Diplomatic Conference Concerning Article 16 (stating Contracting Parties may carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, Article 16 should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.).

179. MASOUYÉ, *supra* note 142, at 59. The WIPO Guide also states that the model law on neighboring rights suggests in its commentary that States might preferably consider listing each exception separately. *See* WPPT, *supra* note 103.

#### D. Limitations and Exceptions to Related Rights and the Sui Generis Right Under EU Directives

Article 5 of the proposed Copyright Directive interprets the obligations set forth in Article 10 of the Copyright Treaty and Article 16 of the WPPT in light of the *acquis communautaire*.<sup>180</sup> Article 5 addresses exceptions to the authors' and related-rights holders' exclusive rights of reproduction (Article 2), communication to the public (Article 3), and distribution (Article 4).<sup>181</sup> Significantly, the Directive introduces limitations and exceptions to the "reproduction right" and "communication to the public right" enjoyed by four categories of related rights holders (performers, phonogram producers, producers of the first fixations of films, and broadcasting organizations), identical to those applicable to authors.<sup>182</sup> The exceptions, which are exhaustively set out, are to be applied and interpreted using the so-called Berne three-step-test, a requirement not imposed under the international conventions.<sup>183</sup> Under this so-called three-step test, the exceptions "shall only be applied to certain specific cases and shall not be interpreted in such a way as to allow their application to be used in a manner that unreasonably prejudices the rightholders' legitimate interests or conflicts with the normal exploitation of their works or other subject matter."<sup>184</sup>

While the proposed Copyright Directive supplies the "communication to the public right" applicable to the so-called "interactive" environment, the Rental and Lending Rights and the Cable and Satellite Directives remain applicable to the "noninteractive" environment.<sup>185</sup> Similar limitations and exceptions are applicable to the three rights set forth in the Rental and

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180. See CRD-Initial Proposal, *supra* note 13, art. 5, point 1, cmts., at 35-36.

181. The distribution right (Article 4) applies only to authors and is therefore not relevant for present purposes. See Copyright Directive Common Position, *supra* note 2, at 23.

182. The reproduction right enjoyed by four categories of related rights holders includes both mandatory and permissive exceptions. Article 5(1) sets forth a mandatory exception for what can summarily be described as transient copying. *Id.* at 23. Articles 5(2) and (3) address permissive exceptions. *Id.* at 24-25. Article 5(3) also introduces exceptions to the communication to the public right. *Id.* at 25.

183. See CRD-Initial Proposal, *supra* note 13, art. 5, point 2, cmts., at 36.

184. *Id.* art. 5(10), cmts., at 41. The so-called three-step-test is set forth in Article 5(4) of the Computer Program Directive. The test originates in Article 9(2) of the Berne Convention, where it is only applicable to exceptions and limitations to the reproduction right. See Berne Convention *supra* note 100, art. 9(2).

185. CRD-Initial Proposal, *supra* note 13, art. 3(3), at 33 ("The provision does not cover noninteractive transmissions. It leaves the existing provisions in this area (Rental Right Directive, Article 8, Cable Satellite Directive, Article 4) untouched.").



Lending Rights Directive.<sup>186</sup> These rights are the fixation right (Article 6), the communication to the public right (Article 8),<sup>187</sup> and the distribution right (Article 9).<sup>188</sup> Article 10 sets out limitations and exceptions identical to the limitations and exceptions featured under Article 15 (1) and (2) of the Rome Convention.<sup>189</sup>

For the purposes of communication to the public by satellite, the Cable and Satellite Directive provides a stronger version of the “communication to the public right” featured in the Rental Rights Directive, which is available where the Cable and Satellite Directive’s definitions are employed.<sup>190</sup> Although the Cable and Satellite Directive does not itself include any limitations and exceptions, those available under Article 10 of the Rental Rights Directive are nonetheless applicable.<sup>191</sup> Due to the amendment introduced by the proposed Copyright Directive, the limitations and exceptions applicable to both Directives are also to be interpreted and applied using the so-called three-step-test.<sup>192</sup>

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186. A reproduction right for related rights holders can also be found in Article 7 of the Rental and Lending Rights Directive. Rental Rights Directive, *supra* note 22, art. 7, at 64. This right is deleted in Article 11(1) of the Copyright Directive Common Position and replaced by the reproduction right found in Article 2 of the Copyright Directive. See Copyright Directive Common Position, *supra* note 2, art. 11(1), at 34-35, and art. 2, at 21. The Commission recognizes that the limitations and exceptions to the reproduction right found under international conventions are “wider to some extent” than those proposed under the Directive. CRD-Initial Proposal, *supra* note 13, at 18.

187. The Rental Rights Directive provides for the harmonization of certain rights with respect to broadcasting and communication to the public for performers, phonogram producers, and broadcasting organizations. Rental Rights Directive, *supra* note 22, art. 8, at 64.

188. *Id.* art. 9, at 64 (providing for an exclusive distribution right, and its exhaustion, for performers, phonogram and film producers, and broadcasting organizations).

189. Depending on the final version of the Copyright Directive, different limitations and exceptions may be applicable to the interactive and noninteractive communication to the public rights. The Common Position introduces some fifteen different limitations and exceptions “to the right of communication to the public.” Copyright Directive Common Position, *supra* note 2, recital 32, at 11. However, if these different limitations and exceptions are considered similar to those permissible under Article 10(2) of the Rental Rights Directive—the equivalent of Article 15(2) Rome Convention—then similar limitations and exceptions would indeed be applicable to both the interactive and noninteractive versions of the right.

190. Cable and Satellite Directive, *supra* note 22, art. 6, at 20.

191. *Id.* art. 4(1), at 20.

192. See Copyright Directive Common Position, *supra* note 2, art. 11(1), at 34 (amending Article 10(3) of the Rental Rights Directive to include the so-called Berne three-step-test). See text accompanying note 184 for the language of the test. See also CRD-Initial Proposal, *supra* note 13, art. 10(2), at 44.

The *sui generis* right introduced in the Database Directive distinguishes permissible extraction and/or reutilization depending on whether use of an insubstantial or substantial part of the database is involved.<sup>193</sup> Article 8(1), a mandatory provision, enables a user to extract and/or reutilize an insubstantial part of a database made available to the public in any manner for "any purposes whatsoever."<sup>194</sup> In the form of the Berne "three-step-test," the Directive indicates that the user may not perform acts under this provision which conflict with the normal exploitation of the database, or which unreasonably prejudice the legitimate interests of the database maker.<sup>195</sup>

Article 9 introduces three exceptions to Article 8(1), thus allowing a user of a database made available to the public in whatever manner, without the authorization of the database maker, to extract or re-utilize a substantial part of a database's contents.<sup>196</sup> Paragraph (a) permits extraction of the contents of a nonelectronic database for private purposes.<sup>197</sup> Paragraph (b) permits extraction for the purposes of illustration for teaching or scientific research.<sup>198</sup> Finally, paragraph (c) permits extraction and/or reutilization for the purposes of public security or an administrative or judicial procedure.<sup>199</sup>

### E. The Conditional Access Directive

An examination of the Conditional Access Directive reveals that there is no safeguard provision or any limitations or exceptions contained within the body of the Directive itself. The Directive defines its relationship with other rights schemes by declaring itself without prejudice to "intellectual property rights," without specifically referencing copyright law or the proposed Copyright Directive.

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193. Database Directive, *supra* note 22, arts. 8, 9. Article 6 of the Database Directive sets forth mandatory and permissive exceptions in respect of the expression of the database which is protectable by copyright.

194. Database Directive, note 22, art. 8, at 26, and recital 49, at 23.

195. *Id.* art. 8(20), at 26. Moreover, Article 8(3) indicates that a user may not cause prejudice to the holder of a copyright or related right in respect of the works or subject matter contained in the database. *Id.*

196. *Id.* recitals 50, 51, at 23, and art. 9, at 26.

197. *Id.*

198. *Id.*

199. In order to benefit from either Article 8 or 9, however, a user must be a "lawful user." The Directive does not define this term.

This approach arguably does not follow the structure of the *acquis communautaire*.<sup>200</sup> First, as discussed above, Article 7(1) of the Computer Program Directive is currently the sole provision in the *acquis communautaire* addressing the relationship between technical protection devices and copyright law.<sup>201</sup> This Article states that it is without prejudice both to copyright rights and exceptions. However, since the Conditional Access Directive only states that it is without prejudice to “intellectual property rights” in general, it is unclear whether one should interpret it as without prejudice to intellectual property rights alone, and not to any exceptions to those rights. Second, the “technology safeguard” clause of the Computer Program Directive is part of the body of the Directive itself. However, this is not the case with the Conditional Access Directive.<sup>202</sup> As Directive recitals do not have legal effect by themselves, the status of Recital 21 of the Conditional Access Directive remains puzzling.

## F. Evaluation

This Part has examined two primary aspects of what it entails to be declared a rights scheme neighboring to copyright law. Foremost, through the use of a safeguard clause it means that no protection granted under the neighboring rights scheme can in any way affect the protection of copyright in literary and artistic works. While this does not mean that copyright law is necessarily applicable, it does lessen the chance of a rights holder finding and opting for an alternative rights structure, such as the Conditional Access Directive. Importantly for innovation, it means that limitations and exceptions found under copyright law are more likely to be applicable.

The second aspect of the interrelationship between copyright and neighboring rights schemes is the inclusion of limitations and exceptions into the neighboring rights schemes. As demonstrated, limitations and ex-

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200. Conditional Access Directive, *supra* note 9, recital 21, at 55 (“Whereas this Directive is without prejudice to the application of any national provisions which may prohibit the private possession of illicit devices, to the application of Community competition rules and to the application of Community rules concerning intellectual property rights.”). While not specifically set out in the Explanatory Memorandum, a reason for this choice of language may well be that the broad reference also applies to industrial property rights and rights under neighboring rights schemes. Still, there is arguably nothing to prevent the Recital from being specific so as to follow in line with the *acquis communautaire*.

201. See *supra* text accompanying notes 154-155. Article 6 “Obligations as to technological measures” of the Copyright Directive Common Position also does not follow the structure of Article 7(1) of the Computer Program Directive. Copyright Directive Common Position, *supra* note 2, art. 6, at 28-30.

202. Conditional Access Directive, *supra* note 9.

ceptions are applicable under all of the international conventions addressing neighboring rights. This is the case even with the Satellite Convention, which although seeking to protect only the satellite signal and not the program contained within, nevertheless features limitations and exceptions to the program content.<sup>203</sup> It is also important to note that since these limitations and exceptions are largely modeled on the Berne Convention, one should appreciate their similar role in promoting creation and innovation.

The EU Directives essentially follow the interrelationship specified between international copyright and neighboring rights conventions, both in terms of safeguard measures and limitations and exceptions. Moreover, the "technology safeguard" clause of the Computer Program Directive and the mandatory "user's right" of the Database Directive further promote innovation by allowing insubstantial extraction and/or reutilization of otherwise-protected content. The effect of the Conditional Access Directive on innovation, however, is highly uncertain because its relationship with copyright law and particularly the applicability of certain innovation-promoting limitations and exceptions is not clearly set forth.

## VII. CONCLUSION

This Article has presented a case for considering the Conditional Access Directive neighboring to copyright. In short, the international neighboring rights conventions such as the Rome and Satellite Conventions have traditionally extended protection to those who mediate the work to the public, including publishers, performers, producers of phonograms, and broadcasting organizations. With the exception of the Conditional Access Directive, the EU *acquis communautaire* has followed this approach.

Why should we now consider "providers of protected services" any differently? This query is particularly important because the Directive, in extending its coverage to Information Society services, is likely to apply to the vast majority of content appearing on the Internet. The nature of the underlying rights scheme matters greatly, especially in this environment. For creators and innovators, copyright law remains best suited to promote overall innovation, and its applicability must be assured vis-à-vis alterna-

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203. STEWART, *supra* note 2, § 10.11, at 278. Stewart cites to the commentators Masouyé and Kerever who politely refer to this piece of Alice in Wonderland logic as 'an anomaly.' *Id.* He further states that: "[s]ometimes 'anomalies' of this kind work out in practice." *Id.* art. 4(1); *see also Satellite Report, supra* note 118, at 72, para. 135 ("The sponsors cited the exceptions in Article 4 as demonstrating that the treaty really deals with programme-content. . . . It was argued that these proposals [on exceptions] are consistent with earlier treaties and standards of international law.").

tive rights structures including that recognized by the Conditional Access Directive.

Member States implementing the Conditional Access Directive should recognize that special forms of protection accorded to various interest groups necessarily have repercussions on other protection schemes. If the example set by the international conventions and the *acquis communautaire* regarding the interrelationship between copyright and neighboring rights is not followed, the legal uncertainty introduced by the Conditional Access Directive will likely increase. As a result, it will conflict with the basic principles, especially the principle of legal certainty, underlying the EU Electronic Commerce framework.<sup>204</sup>

The Conditional Access Directive gives the Member States considerable leeway in formulating appropriate sanctions.<sup>205</sup> It is up to them to implement their obligations and decide how to transpose any Directive. Generally, the national legislator may choose appropriate sanctions, as long as they do not interfere with basic internal market principles set forth in Article 3. He may also select the field of law most appropriate under which to transpose the Conditional Access Directive's provisions.<sup>206</sup> Article 5(1) sets forth the only strict constraint, requiring that sanctions be "effective, dissuasive, and proportionate to the potential impact of the infringing activity."<sup>207</sup> Accordingly, Member States have flexibility, as they can implement the Directive under copyright, related rights, or other rights structures.

At the time of this writing, only the United Kingdom, Denmark, the Netherlands, France and Austria have notified their implementation measures to the European Commission.<sup>208</sup> Moreover, an informal survey of the Member States indicates that implementation will be quite divergent.<sup>209</sup> Some Member States plan on implementing it under telecommunications laws, some under separate legislation, and at least one—the United King-

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204. See *supra* text accompanying note 18.

205. Conditional Access Directive, *supra* note 9, art. 3, at 56.

206. *Id.*

207. *Id.* art. 5(1), at 57.

208. The Conditional Access Directive entered into force on November 28, 1998. Its deadline for transposition by the Member States was May 28, 2000. Conditional Access Directive, *supra* note 9. As of November 27, 2000, only five of the fifteen Member States—the U.K., Denmark, the Netherlands, France, and Austria—have notified their implementation measures to the European Commission. E-mail from Ms. Cécilia-Joanna Verkleij, Directorate-General XV (Internal Market), Section E.4, to Thomas Heide (Nov. 27, 2000) (on file with author).

209. Telephone Conversation with Mr. Luc de Hert, Directorate-General XV (Internal Market), Section E.4 (Apr. 6, 2000).

dom—under copyright and related rights legislation.<sup>210</sup> With this in mind, a few recommendations are made.

Recognizing that access control technology and the legal protection of access control technology can interfere with the application of limitations and exceptions existing both under copyright and neighboring rights schemes:

- In accordance with the *acquis communautaire*, Member States should introduce a “technology safeguard” clause within the body of any implementing legislation to indicate that any access control technology and legal protection for such technology is without prejudice both to rights and exceptions found under intellectual property laws.

Recognizing that legal protection for technological measures can enable an alternative rights structure of similar nature to existing neighboring rights structures which, unless recognized as such, may affect the overall applicability of copyright law:

- In accordance with relevant international conventions and the *acquis communautaire*, Member States should introduce a clause safeguarding copyright law within the body of any implementing legislation.

Recognizing that the extension of legal protection to access control technology may give rise to legal interests to which limitations and exceptions found under copyright law do not apply:

- In accordance with relevant international conventions and the *acquis communautaire*, Member States should introduce appropriate limitations and exceptions within the body of any implementing legislation.

Following these recommendations may help ensure the role of copyright law in the digital environment. However, it still leaves the thorny issue of how to actually apply limitations and exceptions. The presumption largely underlying existing copyright limitations and exceptions is that access to information products is available once they have been published.<sup>211</sup> Moreover, the law, rather than the copyright owner, provides any

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210. *Id.*

211. For example, the Berne Convention in Article 10(1) states that “It shall be permissible to make quotations from a work which has already been lawfully made available to the public . . .” See *supra* note 100.

authorization for uses deemed acceptable under the limitations and exceptions.

In contrast, in the digital environment an information product need not be widely or readily accessible for passive consumption or reuse. When offered as part of an Information Society service, such products may only be intermittently available, and therefore not as easily accessible as copyrighted works traditionally have been in the tangible world. Gaining access in order to apply any limitations and exceptions becomes an issue especially where authorized use is defined by the rights owner through contractually specified provisions, or through the use of technology which permits some uses and prevents others. In addition, gaining access in an environment rife with technological gate-keeping devices may well require the availability of technological devices enabling a user to benefit from limitations and exceptions and the law must also take this into account.<sup>212</sup> To be sure, a difficult legal challenge lies ahead: while it is understandable that rights holders want compensation for any use of their information products, limitations and exceptions which promote creation and innovation cannot be undermined as a result.

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212. The definition of "illicit device" under the Conditional Access Directive, for example, only refers to the "authorisation of the service provider." *See supra* note 31.

